ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2011

ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Annual Consolidated Index 2011

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports,* Butterworth & Co., Toronto

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Abandonment – Collective Agreement – Construction Industry Grievance – Estoppel – Remedies – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93 .....(May/June) 369

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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Sept./Oct.) 613

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter

be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .....(Nov./Dec.) 613

Bargaining Rights – Interim Relief – Intervenor – Practice and Procedure – Trade Union – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION .....(Jan./Feb.) 114

Bargaining Unit – Certification – Dependent Contractor – Employee – Trade Union – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers' employers – Hamilton Cab argued in the alternative that, if the single plate owner owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and

drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential element of Hamilton Cab's business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION ..... (Jan./Feb.) 43

Bargaining Unit – Certification – Employee – The UFCW sought to certify an "all employee" unit of the employer's workers, with specified exclusions – By letter accompanying the application, the union clarified that in its view temporary agency employees were not the employer's workers – During pre-vote discussions, the vote officer noted, among other things, that the applicant was not seeking to represent temporary agency personnel and the employer asserted that the agency employees were its employees for LRA purposes – At the vote, the applicant challenged every agency employee and, after the vote, the applicant made three further representations that it did not wish to represent the agency personnel or that the temporary employees should be excluded because they did not have "sufficient connection with the workplace" – In the last representation, the applicant sought to amend its bargaining unit description to reflect its original position that agency employees should be excluded – The Board refused to allow the amendment, finding that nowhere on the application or in its cover letter did the UFCW seek to exclude the temporary workers if they were employees of the employer – The Board found that the applicant's challenge to the agency workers was only that they were not employees, not that they should be excluded because, as employees, they did not share a community of interest with the permanent staff – To allow the amendment would give the applicant an opportunity to resile from its earlier agreement to an all-employee unit – Matter continues

PUDDY BROTHERS, A DIVISION OF MAPLE LODGE FARMS LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 ..... (Mar./Apr.) 257

Bargaining Unit – *Public Sector Labour Relations Transition Act* – The application arose from the amalgamation of North Bay General Hospital and the Northeast Mental Health Centre to create the North Bay Regional Health Centre – The parties could not agree on whether the Board should maintain the status quo of twelve bargaining units or consolidate them into at least three: service, office and clerical; paramedical; and RN's – The Board found that maintaining the status quo would not be consistent with the purposes of the PSLRTA – The Board noted that the employer's perspective was taken into account unlike certifications in the LRA – The Board also found that amalgamations (in contrast to transfers) create one employer and the prospect of jurisdictional disputes between different bargaining units of employees with similar skills and working in integrated operations would be manifest – The Board was also not persuaded to place the RPNs in a bargaining unit with the RNs for the following reasons: there was no agreement of the parties to do so; the evidence did not establish that the Centre's operational needs would

be furthered by such a placement; and it would not be consistent with the purposes of the PSLRTA – The Board determined a number of other issues and ordered a representation vote in relation to the three bargaining units

NORTH EAST MENTAL HEALTH CENTRE ("NEMHC") NORTH BAY GENERAL HOSPITAL ("NBGH"); RE OPSEU, LOCALS 636, 662, 666; ONA LOCALS 2, 20; CUPE LOCALS 139, 1101, 1623, SEIU, LOCAL 1 .....(Jan./Feb.) 67

Certification – Bargaining Unit – Dependent Contractor – Employee – Trade Union – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers' employers – Hamilton Cab argued in the alternative that, if the single plate owner owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential element of Hamilton Cab's business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION .....(Jan./Feb.) 43

Certification – Bargaining Unit – Employee – The UFCW sought to certify an "all employee" unit of the employer's workers, with specified exclusions – By letter accompanying the application, the union clarified that in its view temporary agency employees were not the employer's workers – During pre-vote discussions, the vote officer noted, among other things, that the applicant was not seeking to represent temporary agency personnel and the employer asserted that the agency employees were its employees for LRA purposes – At the vote, the applicant challenged every agency employee and, after the vote, the applicant made three further representations that it did not wish to represent the agency personnel or that the temporary employees should be excluded because they did not have "sufficient connection with the workplace" – In the last representation, the applicant sought to amend its bargaining unit description to reflect its original position that agency employees should be excluded – The Board refused to allow the amendment, finding that nowhere on the application or in its cover letter did the UFCW seek to exclude the temporary workers if they were employees of the employer – The Board found that the applicant's challenge to the agency workers was only that they were not employees, not that they should be excluded because, as employees, they did not share a community of interest with the permanent staff – To allow the amendment would give the applicant an opportunity to resile from its earlier agreement to an all-employee unit – Matter continues

PUDDY BROTHERS, A DIVISION OF MAPLE LODGE FARMS LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 ..... (Mar./Apr.) 257

Certification – Construction Industry – Employee – Status – On the application filing date the individuals at issue worked less than the majority of the day doing the work of a construction labourer, and the remainder of the day they performed non-construction work for the employer at different sites – The Board first noted that the *Gilvesy* test is used to determine which trade/bargaining unit a worker is in on the application date, if there is a dispute about which trade the employee was working on that date – The Board found that the non-construction work performed by the employees in dispute was covered by separate and distinct provisions of the Act, and that in this particular circumstance there was no more reason to have regard to what the employees in dispute did when they left the construction job site to do non-construction work than there would be in the case of employees who were sent home – The Board found the individuals to be employees in the bargaining unit – Matter continues

JAMWOOD DEVELOPMENTS INC.; CINELLI QUADRA GROUP LTD.; CINELLI, MARIO IN TRUST; CINTREX PROPERTY MANAGEMENT INC.; SURREY CONSTRUCTION INC.; A-MOTION ACCESSIBLE LIFESTYLE SOLUTIONS; A & M WOODWORKING; MAR JAM INVESTMENTS LTD. AND SURREY PLAZA LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL. ..... (Mar./Apr.) 224

Certification – Construction Industry – Employer Support – Representation Vote – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

EURO-CAN MASONRY; RE BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA LOCAL 1 .....(Jul./Aug.) 440

Certification – Construction Industry – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the

fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Sept./Oct.) 561

Certification – Construction Industry – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The

Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Nov./Dec.) 561

Certification – Construction Industry – Judicial Review – Practice and Procedure – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

RONI EXCAVATING LIMITED AND/OR 865217 ONTARIO INC. O/A IRON EXCAVATING AND GRADING AND/OR NIRO BROS. EXCAVATING & GRADING INC. AND/OR IRON TRIO INC. AND/OR ORIN LANDSCAPING, RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793....(Jul./Aug.) 511

Certification – Construction Industry – Practice and Procedure – Related Employer – Unfair Labour Practice – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE 1702786 ONTARIO INC. ..... (Mar./Apr.) 189

Certification – Construction Industry – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of

hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 582

Certification – Construction Industry – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Nov./Dec.) 582

Certification – Construction Industry – Termination – Timeliness – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The

Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely – Applications dismissed

TRUDEL & SONS ROOFING LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 .....(Jul./Aug.) 485

Certification – Construction Industry – Trade Union – After finding that the Restoration Council of Ontario (RCO) was a council of trade unions within the meaning of sections 1(1) and 126(1) of the Act, the Board addressed the issue of whether a council of trade unions could have individuals as members – The Board first noted that although the Act defines a trade union as an organization of employees, the case law does not require that it must be an organization of only employees, and that the same reasoning ought to be applied when determining whether an organization is a council of trade unions – The Board went on to find that a council of trade unions once certified is a "trade union" within the meaning of the Act, and that together with s. 12(3) contemplates the possibility of a certified council of trade unions having individuals as members – Finally, if an organization of employees can be a trade union, and an organization of trade unions, once certified, can be a trade union, then surely one entity that encompasses both employees and unions can also be a trade union – Certification granted

A.A.F. CONSTRUCTION; RE THE RESTORATION COUNCIL OF ONTARIO ..... (Mar./Apr.) 197

Certification – Interim Relief – Unfair Labour Practice – The Board held a consultation into the discharge of one employee during an organizing drive – In its analysis of the relevant criteria, the Board determined that the employer's rationale for dismissing the employee six weeks after the alleged incident giving rise to the discipline was too remote and unpersuasive – More significantly, the Board looked at the irreparable harm to the union, and the expressed fears of employees who would have to testify in the unfair labour practice complaint – If the conclusions reached by the employees regarding links between the campaign and the employee's discharge are not corrected, growing erosion of union support may not be stemmed – Reinstatement ordered

AUTHENTECH COMMUNICATIONS CANADA INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 203

Certification – Judicial Review – Related Employer – KAS sought judicial review of the Board's decision declaring KAS and Metro Waste a related employer – KAS argued it was unreasonable for the Board to proceed with a s. 1(4) analysis without having first concluded it was impossible to ascertain who the "true" employer is – KAS also argued it was unreasonable for the Board to invoke s. 1(4) in the absence of any identifiable labour relations mischief – The Court held the Board's reasons as a whole gave appropriate consideration to the criteria for the operation of s. 1(4), and indeed identified three different forms of labour relations mischief – Application dismissed

KAS GROUP OF COMPANIES; RE TEAMSTERS LOCAL UNION NO. 419, METRO WASTE PAPER RECOVERY INC., c.o.b. METRO MUNICIPAL RECYCLING SERVICES INC.....(Jan./Feb.) 185

Certification – Practice and Procedure – Unfair Labour Practice – UFCW was overwhelmingly defeated in a certification application in March 2005 – The day before the representation vote was held Wal-Mart filed an unfair labour practice complaint primarily concerned with an assault by an employee (who was also a representative of the UFCW) on another employee – The UFCW also filed a ULP on the same day, which did not address the assault, but made various allegations against Wal-Mart – After failed attempts at mediation, then 27 months of neither party contacting the Board, and then further delays, the Board considered Wal-Mart's motion to have this matter dismissed because there was no labour relations purpose to proceed and because of administrative delay – The Board relied on the following factors, among others, to exercise its discretion to dismiss the application on the basis that there was no labour relations purpose to proceed: the Board had already struck between one third and one half of the UFCW's allegations; the ballots were cast over 6 years ago and the UFCW overwhelmingly lost; the bargaining unit composition had dramatically changed so that two thirds of the current employees were not employed at the time of the incidents; it was not clear that the UFCW could make out a case for the relief it sought; and the cost implications to the parties and the public – Certification application and ULPs dismissed

WAL-MART CANADA CORP.; RE UFCW .....(Jul./Aug.) 490

Certification Where Act Contravened – Intimidation and Coercion – The union alleged that the responding employer and named individuals violated sections 70, 72, and 76 of the Act – The union requested relief under section 11 of the Act – The union asserted that the employer fired eight employees after the employer learned that the union was obtaining signed membership cards – The employer denied that it had violated the Act and claimed that the layoffs were due to a shortage of work – The Board found that the employer violated the Act when it laid off the employees for exercising protected rights under the Act and it hindered the employees' right to select or be represented by a trade union – The Board ordered the certification of the union under section 11 of the Act, as no other remedy would sufficiently counter the effects of the violation – The Board added that it would remain seized to determine any compensation to employees and ordered the employer to post copies of the decision and a Notice to Employees about the decision in the workplace

FINN WAY GENERAL CONTRACTORS INC., DAVID KARIMI, JEFF BEDARD, PAT OUELETTE AND FRANK BISIGNANO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669.....(May/June) 307

Charter of Rights and Freedoms – Construction Industry – Judicial Review – Non-Construction Employer – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1. – Section 127.2 of the Act was declared constitutionally inoperative in the circumstances of this case – The Court reviewed *Health Services* and determined that the first question to answer was whether s. 127.2, either in its purpose or effect, substantially interfered with the process of collective bargaining – First, the court found that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions" – The Court noted that had the Board granted the

declaration sought by IESO, no employee of IESO would have been affected by the termination of the collective agreements and the termination of bargaining rights of the Unions; and based on the evidence, no future employees of the IESO would be denied benefits under these collective agreements – The court found that the effect of the Board's decision was to protect the collective agreements and acquired bargaining rights of the Unions and their members under the construction industry provisions – In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining – The Court found this was an error in law "as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome, rather, it protects the collective bargaining process from substantial interference" – The court found that the legislation did not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work – Finally the court found that if there was a breach of s. 2(d) of the *Charter*, s. 127.2 is nevertheless constitutional as it is a reasonable limit within s. 1 of the *Charter* – Application granted – Matter referred back to the Board to issue a declaration in accordance with s. 127.2

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO.(Jan./Feb.) 166

Civil Claim – Rainbow Concrete asserted a tort claim (misfeasance in a public office) for damages against a Vice-Chair of the Board relating to his conduct in a number of proceedings before the Board – One decision had already been the subject of an unsuccessful judicial review by Rainbow Concrete and two more were still pending before Divisional Court – The Court found the claim to be an abuse of process as it was a collateral attack on the Board's decision – The Court also found that the pleadings failed to adequately plead the material facts necessary to support the tort of misfeasance in public office – Finally, the court, while not deciding the matter on this issue, found the defendant's arguments about the extension of judicial immunity to a Vice-Chair, while acting in his or her adjudicative capacity to be persuasive – Statement of Claim was struck without leave to amend

RAINBOW CONCRETE; RE IAN ANDERSON AND INTERNATIONAL UNION OF OPERATING ENGINEERS..... (Mar./Apr.) 267

Collective Agreement – Abandonment – Construction Industry Grievance – Estoppel – Remedies – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The

evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93 .....(May/June) 369

Collective Agreement – Grievance – Construction Industry – Evidence – During the life of a collective agreement OPG engaged in a construction project that included an electrical portion that made up between 55% to 60% of the total trades work performed - The electrical portion was contracted to a contractor that did not employ the applicant's members – The dispute centred around the meaning of the phrase "predominantly electrical" in Letter of Understanding No. 2 of the collective agreement – Letter of Understanding No. 2 required that "predominantly electrical" work be performed by the applicant's members – To determine the ambiguous meaning of the phrase, the Board permitted the parties to call extrinsic evidence to establish the context within which "predominantly electrical" was negotiated – The Board found that Letter of Understanding No. 2 was intended to provide the applicant with a guaranteed number of hours when the respondent engaged in electrical projects – Initially, the respondent proposed the phrase "exclusively electrical" as a condition of the guarantee, however the applicant rejected this language on the basis that it was too under-inclusive – "Predominantly electrical" was ultimately agreed upon instead – After reviewing the extrinsic evidence, the Board determined that the respondent interpreted the phrase "predominantly electrical" to mean the same thing as "exclusively electrical", effectively a purely electrical project with some very minimal support by other trades – However, the Board was not satisfied that the applicant shared this interpretation and found that in fact, there was no mutual agreement between the parties with respect to the meaning of the phrase – The Board applied the common interpretive principle that words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or the collective agreement read as a whole suggests that a different meaning is intended – The Board found that there was no evidence of context that the parties intended "predominantly electrical" to have a special or different meaning – As a result, the Board found that the words must be given their plain and ordinary meaning – The Board determined that the plain and ordinary meaning of the words "predominantly electrical" was that trades work on the construction project must consist of at least 50% electrical work – The Board found that since the project consisted of 55% – 60% electrical work, the electrical work on the project should have been performed by members of the applicant – Application allowed

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS.....(Jan./Feb.) 82

Collective Agreement – *Hospital Labour Disputes Arbitration Act* – Interest Arbitrations – Termination – The applicant applied for a declaration that the union no longer represented the employees in its bargaining unit – The union argued that the application was untimely because several clauses of an interest arbitration award that was issued to

the parties were still in dispute – The employer claimed that there were no outstanding issues with the arbitration award – Concerning timeliness, the Board considered whether the arbitration award determined a collective agreement under section 12(2) of the *Hospital Labour Disputes Arbitration Act* and s. 63(2) of the Act, and found that it did; the application was therefore timely – The Board noted that the arbitrator's introductory remarks indicated that the agreed-upon items were to be incorporated into the collective agreement and that the arbitrator would only remain seized to address implementation issues – The Board also cited the fact that the arbitrator indicated the term of the collective agreement settled by the award, and the fact that the union had given notice to bargain as evidence that a collective agreement had been determined – The fact that the parties had not signed or prepared a formal collective agreement was inconsequential to the Board's finding that a collective agreement did exist – Termination application continues

PALISADES RETIREMENT RESIDENCE INC.; RE CLAUDETTE BRADSHAW; RE HOSPITALITY & SERVICES TRADES UNION LOCAL 261 .....(May/June) 382

Collective Agreement – Termination – Timeliness – Application for termination of bargaining rights under s. 63 – The responding union submitted that the application was untimely pursuant to ss. 63(2)(a) because it was not filed within the last three months of the operation of the collective agreement – The Board found that the application was timely, as the union and employer intended to make the collective agreement retroactive to the date of the expiration of the prior collective agreement – The Board based its finding on the express duration clause set out in several places in the collective agreement and the exercise of a number of important entitlements under the collective agreement including the right to grieve – The two purposes of ss. 58(1) are to provide certainty regarding the term of the collective agreement and to provide a minimum year of peace – In examining the duration of a collective agreement in a mature bargaining relationship, an interpretation that respects both purposes of ss. 58(1) is preferable – The Board may consider the pattern and history of the bargaining relationship when determining retroactivity – In a mature bargaining relationship where a pattern of bargaining has evolved and where collective agreements on their face indicate a duration which runs for a minimum of one year from the expiration of the prior collective agreement, there will be a heavy onus on the party claiming otherwise, even if the collective agreement was ratified or executed at a subsequent date – To find otherwise would potentially wreak havoc on the first purpose of ss. 58(1) and increase inquires by employees or third parties into when an agreement expires – Matter continues

ST. CHARLES VILLAGE LIMITED PARTNERSHIP C.O.B. AS ST. CHARLES VILLAGE; RE JUDY CARRIGAN; SEIU LOCAL 1 CANADA.....(Jan./Feb.) 101

Colleges Collective Bargaining Act – Duty of Fair Representation – Practice and Procedure – The applicant, an employee of the Colleges, made an application under the *Labour Relations Act* asserting that OPSEU had violated s. 74 – OPSEU and the College submitted that the Board had no jurisdiction to hear the complaint since it was filed under the LRA, rather than the CCBA – Pursuant to Rule 40.5 the Board found it advisable to allow the filing to be amended – There was no purpose in dismissing the application: although it was filed on the wrong form, the obligation on the union is the same and the substance of the complaint would have been the same – Furthermore were the complaint dismissed, the applicant could just file again on the proper form and while the time period lapse would be significant, OPSEU and the College could not point to any prejudice, since they would have known the substance of the complaint – Additionally, notwithstanding a long delay (46 months), the Board found the length of the

administrative delay and the resulting waning of memories was not the fault of the Board, rather it was a joint effort of the applicant, the College, the union and the Board – The Board noted that it was the College (not the responding party union) bringing the abuse of process motion, and that it, like most responding parties to litigation, was almost certainly of the view that as long as the applicant was not interested in proceeding with the complaint, it was happy to let it languish – Quite simply, if the College wanted the application to proceed it could have simply written to the Board – Matter continues

CENTENNIAL COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE ADHIN SUKHU; ONTARIO PUBLIC SERVICE EMPLOYEES UNION ..... (Mar./Apr.) 217

Construction Industry – Alteration of Jurisdiction – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Sept./Oct.) 613

Construction Industry – Alteration of Jurisdiction – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Nov./Dec.) 613

Construction Industry – Certification – Employee – Status – On the application filing date the individuals at issue worked less than the majority of the day doing the work of a construction labourer, and the remainder of the day they performed non-construction work for the employer at different sites – The Board first noted that the *Gilvesy* test is

used to determine which trade/bargaining unit a worker is in on the application date, if there is a dispute about which trade the employee was working on that date – The Board found that the non-construction work performed by the employees in dispute was covered by separate and distinct provisions of the Act, and that in this particular circumstance there was no more reason to have regard to what the employees in dispute did when they left the construction job site to do non-construction work than there would be in the case of employees who were sent home – The Board found the individuals to be employees in the bargaining unit – Matter continues

JAMWOOD DEVELOPMENTS INC.; CINELLI QUADRA GROUP LTD.; CINELLI, MARIO IN TRUST; CINTREX PROPERTY MANAGEMENT INC.; SURREY CONSTRUCTION INC.; A-MOTION ACCESSIBLE LIFESTYLE SOLUTIONS; A & M WOODWORKING; MAR JAM INVESTMENTS LTD. AND SURREY PLAZA LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 224

Construction Industry – Certification – Employer Support – Representation Vote – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

EURO-CAN MASONRY; RE BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA LOCAL 1 .....(Jul./Aug.) 440

Construction Industry – Certification – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the

employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Sept./Oct.) 561

Construction Industry – Certification – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the

video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Nov./Dec.) 561

Construction Industry – Certification – Judicial Review – Practice and Procedure – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

RONI EXCAVATING LIMITED AND/OR 865217 ONTARIO INC. O/A IRON EXCAVATING AND GRADING AND/OR NIRO BROS. EXCAVATING & GRADING INC. AND/OR IRON TRIO INC. AND/OR ORIN LANDSCAPING, RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793....(Jul./Aug.) 511

Construction Industry – Certification – Practice and Procedure – Related Employer – Unfair Labour Practice – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE 1702786 ONTARIO INC.....(Mar./Apr.) 189

Construction Industry – Certification – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments

(ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 582

Construction Industry – Certification – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Nov./Dec.) 582

Construction Industry – Certification – Termination – Timeliness – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely – Applications dismissed

TRUDEL & SONS ROOFING LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51 .....(Jul./Aug.) 485

Construction Industry – Certification – Trade Union – After finding that the Restoration Council of Ontario (RCO) was a council of trade unions within the meaning of sections 1(1) and 126(1) of the Act, the Board addressed the issue of whether a council of trade unions could have individuals as members – The Board first noted that although the Act defines a trade union as an organization of employees, the case law does not require that it must be an organization of only employees, and that the same reasoning ought to be applied when determining whether an organization is a council of trade unions – The Board went on to find that a council of trade unions once certified is a "trade union" within the meaning of the Act, and that together with s. 12(3) contemplates the possibility of a certified council of trade unions having individuals as members – Finally, if an organization of employees can be a trade union, and an organization of trade unions, once certified, can be a trade union, then surely one entity that encompasses both employees and unions can also be a trade union – Certification granted

A.A.F. CONSTRUCTION; RE THE RESTORATION COUNCIL OF ONTARIO ..... (Mar./Apr.) 197

Construction Industry – *Charter of Rights and Freedoms* – Judicial Review – Non-Construction Employer – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1. – Section 127.2 of the Act was declared constitutionally inoperative in the circumstances of this case – The Court reviewed *Health Services* and determined that the first question to answer was whether s. 127.2, either in its purpose or effect, substantially interfered with the process of collective bargaining – First, the court found that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions" – The Court noted that had the Board granted the declaration sought by IESO, no employee of IESO would have been affected by the termination of the collective agreements and the termination of bargaining rights of the Unions; and based on the evidence, no future employees of the IESO would be denied benefits under these collective agreements – The court found that the effect of the Board's decision was to protect the collective agreements and acquired bargaining rights of the Unions and their members under the construction industry provisions – In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining – The Court found this was an error in law "as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome, rather, it protects the collective bargaining process from substantial interference" – The court found that the legislation did not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work – Finally the court found that if there was a breach of s. 2(d) of the *Charter*, s. 127.2 is nevertheless constitutional as it is a reasonable limit within s. 1 of the *Charter* – Application granted – Matter referred back to the Board to issue a declaration in accordance with s. 127.2

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO.(Jan./Feb.) 166

Construction Industry – Discharge – Unfair Labour Practice – The Union brought an application alleging that the discharge of three individuals on the date of application for certification contravened sections 72 and 76 of the Act as it was motivated, at least in part, by anti-union animus – Parkview took the position that one of the employees had been properly terminated at the end of his three month probationary period because he had difficulties performing some of the tasks equipment operators are required to perform – Parkview also presented evidence regarding its financial difficulties – Once the operations manager decided he would lay off two construction labourers in order to meet the need to reduce costs, he decided to terminate them the same day as the third individual, as he believed this would have less impact on the morale and productivity of the remaining workers – The applicant claimed that the operations manager's explanations were not credible, considering that there was no probationary period in place, and that the cost savings achieved were minimal compared to the financial difficulties the company faced – Furthermore, the employees were, contrary to past practice, laid off mid-week rather than at the end of the week – Finally, the operations manager was aware that an organizing campaign was underway and that the applicant had met with the excavating crew the day before the termination took place – The Board determined that Parkview had met the burden of proof to demonstrate that its decision to terminate the employees in question was not contrary to the Act – While the timing of the termination is very suspicious, there was no evidence of anti-union behaviour or that Parkview had reacted to the organizing efforts of the applicant in any illegitimate way – Given the operations manager's uncontradicted testimony and the failure to cross-examine him on this point, the Board refused to draw the inference that because the operations manager was aware that there had been a union meeting the day before the terminations, he knew the employees had signed cards during the meeting – Parkview's evidence was complete, consistent and credible, and was not contradicted by the applicant – Finally, Parkview would have had no basis for knowing or even suspecting that the applicant was filing the application for certification the day the dismissals took place – That decision had been made by the applicant's co-ordinators the evening before and they had not informed any Parkview employee – Application dismissed

PARKVIEW HOMES, 149282 ONTARIO INC. AND 1490623 ONTARIO INC., PARKVIEW EXCAVATION SERVICES INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Mar./Apr.) 240

Construction Industry – Employment Standards – The main issue was whether the employee was a "construction employee" and as a result, the employer was exempt from paying termination and severance – The employer was in the road building business and met the definition of an employer in the construction industry – The Board noted however that this did not necessarily mean that all of its employees were "construction employees" – In assessing the employee's work the Board found he worked the vast majority of his time off-site in the main yard or shop, and when he did work at the site, it was not to repair roads – Accordingly, since he was not employed at the site, he did not fall within the first branch of the "construction employee" definition – The Board also found that the employee did not meet the other branch of the definition as the employer was not able to establish that the employee was commonly associated with the work of either LIUNA or IUOE members – The employer did not satisfy the Board that the employee was regularly or routinely dispatched to the construction site, nor that his principal duty on site was to

repair the machinery – Therefore the employee was not a "construction employee" and was entitled to termination and severance pay – Appeal allowed

COCO PAVING INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DUGAGJIN GJOCAJ.....(Jan./Feb.) 21

Construction Industry – Evidence – Practice and Procedure – Witness – The union sought production of witness notes that were protected by litigation privilege – The Board followed the Court's decision in *Kennedy v. McKenzie* which set out a number of exceptions to the claim of privilege – The Board noted that there did exist another reasonable form of evidence that could provide the information that the union sought, namely, the witness may testify under oath before the Board – The Board also noted that while it had the authority to accept the evidence pursuant to s. 111(2)(e), it chose to exercise its discretion to follow the Court's approach in this instance – The Board declined to order the employer to produce the notes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(May/June) 327

Construction Industry – Grievance – Evidence – Collective Agreement – During the life of a collective agreement OPG engaged in a construction project that included an electrical portion that made up between 55% to 60% of the total trades work performed - The electrical portion was contracted to a contractor that did not employ the applicant's members – The dispute centred around the meaning of the phrase "predominantly electrical" in Letter of Understanding No. 2 of the collective agreement – Letter of Understanding No. 2 required that "predominantly electrical" work be performed by the applicant's members – To determine the ambiguous meaning of the phrase, the Board permitted the parties to call extrinsic evidence to establish the context within which "predominantly electrical" was negotiated – The Board found that Letter of Understanding No. 2 was intended to provide the applicant with a guaranteed number of hours when the respondent engaged in electrical projects – Initially, the respondent proposed the phrase "exclusively electrical" as a condition of the guarantee, however the applicant rejected this language on the basis that it was too under-inclusive – "Predominantly electrical" was ultimately agreed upon instead – After reviewing the extrinsic evidence, the Board determined that the respondent interpreted the phrase "predominantly electrical" to mean the same thing as "exclusively electrical", effectively a purely electrical project with some very minimal support by other trades – However, the Board was not satisfied that the applicant shared this interpretation and found that in fact, there was no mutual agreement between the parties with respect to the meaning of the phrase – The Board applied the common interpretive principle that words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or the collective agreement read as a whole suggests that a different meaning is intended – The Board found that there was no evidence of context that the parties intended "predominantly electrical" to have a special or different meaning – As a result, the Board found that the words must be given their plain and ordinary meaning – The Board determined that the plain and ordinary meaning of the words "predominantly electrical" was that trades work on the construction project must consist of at least 50% electrical work – The Board found that since the project consisted of 55% –60% electrical work, the electrical work on the project should have been performed by members of the applicant – Application allowed

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS.....(Jan./Feb.) 82

Construction Industry – Health and Safety – Four different construction contractors filed individual applications pursuant to section 61(1) of the *Occupational Health and Safety Act* (OHSA) involving incidents concerning the operations of tower cranes and subsequent Orders made by various Ministry of Labour Inspectors – In each situation the Inspector required the contractor to produce a report by a professional engineer stating that the equipment, machine or device "was not likely to endanger a worker" pursuant to section 54(1)(k) of the OHSA – Each of the applicants retained an engineering firm who produced reports which were deemed to be unacceptable by the various Inspectors because they did not use the specific phrase "not likely to endanger a worker" – The applicants argued that the engineers' reports should not have to use this specific wording – The Board found that section 54(1)(k) of the OHSA clearly reflects the intent of the Legislature to require the employer to provide a report written by a professional engineer that precisely states that the equipment, machine or device is "not likely to endanger a worker" – The Board stated that these precise words create consistency of assessment and minimize confusion or debate among inspectors as to what benchmark must be reached in the content of an engineer's report – The Board was of the view that it was reasonable for an Inspector to conclude that if a professional engineer's report did not state that the equipment, machine or device was "not likely to endanger a worker", a danger or hazard persisted and a stop work order was necessary – The Board also noted that the Inspectors' decisions in these cases not to lift the stop work orders or non-use restrictions were justified, as many of the conditions which gave rise to the orders were not resolved – In conclusion, the Board found that all four construction contractors in these applications were not in compliance with the Inspectors' Orders and dismissed the applicants' appeals

HARDWALL CONSTRUCTION LTD.; RE, THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNIVERSAL WORKERS UNION L.I.U.N.A. LOCAL 183, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND NEIL MARTIN, INSPECTOR; ET AL.....(May/June) 329

Construction Industry – Health and Safety – *Trades Qualification and Apprenticeship Act* – The Carpenters were used to install certain prefabricated cup sinks and faucets in the countertop during the construction of the new laboratory – An inspector issued an Order that the work must be done by plumbers pursuant to the Regulations under the TQAA – The Board found that the installation of the sinks and faucets (by placing them in the holes and bolting them down) was a part of installing the counters themselves – Therefore, as built in fixtures, the work was carpenters' work within the meaning of the Regulations – The Board made it clear it was not concluding that the work was not plumbers' work, rather only that it was not exclusively plumbers' work according to the Regulations – Given one exception (the threading of copper lines in the hot and cold faucets was not work connected to the installation of the counters and accordingly belonged exclusively to the plumbers), the Board allowed the appeal

ACTION GROUP INC. AND DAN DIGNARD, INSPECTOR; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593.....(Jul./Aug.) 418

Construction Industry – Health and Safety – *Trades Qualification and Apprenticeship Act* – The Carpenters appealed an Order of the Inspector finding that mounting bed locator frames in hospital rooms was performed contrary to the regulations under the OHSA and the TQAA – The Board found that the primary function of the frames was to provide the precise location for the beds through the use of the fixed headboards, so that they can be easily and accurately lined up under the head walls – Although the frames included electrical fixtures, apparatus and conductor enclosures , the Board found the frames were not electrical fixtures, apparatus and conductor enclosures in and of themselves, but rather built-in fixtures – The fact that the Carpenters pulled the electrical conduit through the holes in the frames was no different from when they cut holes in drywall and pulled conduit through the drywall – Once they have pulled the conduit through the frame they did not run the conduit through the raceways or make any electrical connections – Inspector's order rescinded

ELLIS-DON CORPORATION AND DAN DIGNARD, INSPECTOR; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1946 .....(Jul./Aug.) 432

Construction Industry – Jurisdictional Dispute – The work in this dispute fell within the heavy engineering sector of the construction industry and consisted of carpentry forming work performed at the East Hamilton Recreational Trail and Waterfront Link Pedestrian Bridge – The City of Hamilton, which had previously recognized the Carpenters in the ICI sector, let a contract for the construction of the bridge with a special provision that required bidders to perform heavy engineering sector work covered under the Carpenters' collective agreement in accordance with that agreement – Dufferin was the successful bidder but was not bound to the Carpenters in the heavy engineering sector – Dufferin subcontracted to Alliance which was bound to both the Carpenters and Labourers – Alliance assigned the work in dispute to the Carpenters and the non-concrete forming work to the Labourers – The Labourers filed a grievance and a jurisdictional dispute against Alliance – A primary issue was the identity of the employer, and which party's work assignment practices should be considered – The Board found that where the owner of a project had one or more relevant collective bargaining obligations and contracted the work in dispute to a general contractor, those collective bargaining obligations are factors that the Board would consider in jurisdictional disputes – As a result the Board considered the work assignment practices of Alliance, Dufferin and the City – In determining the jurisdictional dispute, the Board focused on three critical factors; collective bargaining relationships, employer practice and area practice – The practice evidence of the City, Dufferin and Alliance weighed in favour of the assignment of work in dispute to the Labourers – The area practice very strongly favoured the assignment of the disputed work to the Labourers – Both collective agreements covered the work in dispute – The Board determined that the work should have been assigned to the Labourers and the existence of a collective agreement between the Carpenters and the City was insufficient on its own to outweigh the employer and area practices which strongly favoured the Labourers – Application allowed

ALLIANCE VERDI CIVIL INC., UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18, DUFFERIN CONSTRUCTION COMPANY AND THE CITY OF HAMILTON; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837 .....(Jan./Feb.) 1

Construction Industry – Project Agreement – The Local gave a timely notice of disapproval of the project agreement pursuant to s. 163.1(8) – The project agreement proposed that the application of the Provincial Collective Agreements to the project would be amended by

a reduction in wages by 5% and a standard work week of five, 8 hour days with overtime only after 40 hours – The Local argued the Project Agreement created a greater rate of reduction in "total wages and benefits" paid to its members compared to other trades – The Board agreed with the conclusion in *Shell Canada Products* that the application of a straight percentage reduction to employees who have their normal work week increased with premium pay becoming payable only after they work in excess of the lengthened work week, increases the proportional reduction of their total wages and benefits – The Board rejected other arguments from SCA that the Local was improperly benefiting by its objection or it was acting in bad faith when it noted that there could be nothing improper about a trade union seeking to obtain a result that is mandated by the Act – The Board concluded that the proper manner in which to determine the proportionate reductions in the total wages and benefits of each group of employees represented by a trade is to calculate the total of all hourly payments (other than payments to an employer association fund) that an employer must make under a Provincial Collective Agreement in respect of each hour of work performed by a bargaining unit employee, as compared to the payments an employer is obliged to make for each hour of work of a bargaining unit employee under the Project Agreement, assuming the employee in both cases works a full 40 hour week – Further submissions directed

SARNIA CONSTRUCTION ASSOCIATION AS AGENT FOR NOVA CHEMICALS; RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON, SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL UNION 128, ET AL .....(Jul./Aug.) 460

Construction Industry – Standing – Unfair Labour Practice – The IUOE argued that Graham had no standing to advance allegations that the union had contravened the Act and, as a consequence, the membership evidence provided in the certification application did not reflect the true wishes of the employees in the bargaining unit – The impugned conduct suggested intimidation, misrepresentation and/or coercion – Distinguishing earlier jurisprudence, the Board held that an employer does have a legal interest in whether membership evidence that a union relied on to attain certification is a free expression of the employees' wishes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 .....(Jan./Feb.) 32

Construction Industry Grievance – Abandonment – Collective Agreement – Estoppel – Remedies – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The

evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93 .....(May/June) 369

Construction Industry Grievance – Employer – Health and Safety – The union alleged the responding party violated the collective agreement when it barred the union's representatives from attending at its job site – The responding party acknowledged barring the representatives because the union refused to provide it with an approved registration as required by the *Occupational Health and Safety Act* – The responding party argued that the union is an "employer" and its representatives attend the job sites as "workers" – Although the collective agreement provides that representatives shall have access to working areas, the responding party argued that complying with the contract would violate a direct order of a health and safety inspector – The Board found that the registration form related to "constructors" and "employers engaged in construction" – The union representatives, like others authorized by law to access the site (police, firefighters, municipal or health and safety inspectors), are not there at the behest of the constructor, nor under the constructor's direction or control – These "employers" are not bound to complete the OHSA form – Grievance allowed

CANTRETROT INVESTMENT LIMITED; H & R DEVELOPMENTS AND/OR; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU .....(May/June) 288

Construction Industry Grievance – Evidence – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK

CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS ..... (Sept./Oct.) 517

Construction Industry Grievance – Evidence – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS .....(Nov./Dec.) 517

Construction Industry Grievance – Judicial Review – The Board had decided that OPG, although not the direct employer, was exercising power in respect of the grievor's employment when it banned him from its sites, that its actions came within the scope of the EPSCA Agreement, and that it had to establish that those actions met the standard of the Agreement (see [2010] OLRB Rep. March/April 298) – The Court found this was a preliminary ruling on the arbitrability of the grievance, noted that the Court does not generally entertain judicial review of a preliminary ruling while a proceeding is pending before a tribunal and was not persuaded there were any exceptional circumstances to deviate from that in this case – Application was quashed as premature

ONTARIO POWER GENERATION INC.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA..... (Mar./Apr.) 269

Construction Industry Grievance – Judicial Review – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the

arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD..... (Sept./Oct.) 629

Construction Industry Grievance – Judicial Review – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part

of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 629

Construction Industry Grievance – The union grieved after the employer ordered six employees not to report for work on a day the employer scheduled a foremen meeting – The union asserted the employees were suspended without cause rather than laid-off because a lay-off required there to be a shortage of work – In the alternative, if there was a lay-off, the union argued the employer breached the lay-off provisions of the collective agreement because employees with less seniority than the grievors were permitted to report to work on the relevant day – In response, the employer relied on the standoff provisions of the collective agreement which allowed it to standoff part or all of a crew if the crew was unable to proceed with work – The employer asserted the grievors were unable to work because there were no foremen available to supervise them – The Board held the employer acted properly within its rights under the standoff provisions of the agreement – The Board reasoned a standoff is a type of short duration lay-off but the parties clearly differentiated between the two in the collective agreement – Specifically, the collective agreement did not stipulate a standoff could only occur due to a shortage of work or provide seniority-based bumping rights in such circumstances – The Board further reasoned the employer made a *bona fide* operational decision and was not obligated under the agreement to pursue or implement alternative scheduling options such as overstaffing other crews or hiring additional foremen – Grievance dismissed

HYDRO ONE INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA LOCAL 1059 ..... (Sept./Oct.) 534

Construction Industry Grievance – The union grieved after the employer ordered six employees not to report for work on a day the employer scheduled a foremen meeting – The union asserted the employees were suspended without cause rather than laid-off because a lay-off required there to be a shortage of work – In the alternative, if there was a lay-off, the union argued the employer breached the lay-off provisions of the collective agreement because employees with less seniority than the grievors were permitted to report to work on the relevant day – In response, the employer relied on the standoff provisions of the collective agreement which allowed it to standoff part or all of a crew if the crew was unable to proceed with work – The employer asserted the grievors were unable to work because there were no foremen available to supervise them – The Board held the employer acted properly within its rights under the standoff provisions of the agreement – The Board reasoned a standoff is a type of short duration lay-off but the parties clearly differentiated between the two in the collective agreement – Specifically, the collective agreement did not stipulate a standoff could only occur due to a shortage of work or provide seniority-based bumping rights in such circumstances – The Board further reasoned the employer made a *bona fide* operational decision and was not obligated under the agreement to pursue or implement alternative scheduling options such as overstaffing other crews or hiring additional foremen – Grievance dismissed

HYDRO ONE INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA LOCAL 1059 ..... (Nov./Dec.) 534

Crown Employees Collective Bargaining Act – Duty to Bargain in Good Faith – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587..... (Sept./Oct.) 601

Crown Employees Collective Bargaining Act – Duty to Bargain in Good Faith – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587.....(Nov./Dec.) 601

Delay – Discharge – Duty of Fair Representation – The complainant was discharged for alleged neglect of duty and abusive treatment of an individual in his care – The union failed to consider whether to pursue the matter to arbitration until the deadline for making a referral to arbitration had long passed – The matter was subsequently referred to arbitration and the arbitrator found the referral to be untimely and he had no jurisdiction to extend the time limit – The union did not explain this failure and the Board found the union grossly negligent in failing inexplicably to make a decision about what to do with the grievance until well beyond the time frame set out in the collective agreement – The Board directed the parties to meet with an LRO to discuss remedy leaving aside the issue of the impact of *Windsor Western Hospital* on the Board's remedial options in these circumstances, unless it is necessary to deal with that issue – Remedy to be determined – Application granted

CALVIN BRIAN MACLEAN; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA (CAW-CANADA) AND ITS LOCAL 40; RE TOBIAS HOUSE ATTENDANT CARE INC. .....(Jul./Aug.) 427

Dependent Contractor – Bargaining Unit – Certification – Employee – Trade Union – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers' employers – Hamilton Cab argued in the alternative that, if the single plate owner owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab

exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential element of Hamilton Cab's business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION .....(Jan./Feb.) 43

Discharge – Duty of Fair Representation – Grievance – Timeliness – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to be the case), the then union steward failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

LOUIE SENIA; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 213; RE KINARK CHILD AND FAMILY SERVICES .....(Jul./Aug.) 469

Discharge – Construction Industry – Unfair Labour Practice – The Union brought an application alleging that the discharge of three individuals on the date of application for certification contravened sections 72 and 76 of the Act as it was motivated, at least in part, by anti-union animus – Parkview took the position that one of the employees had been properly terminated at the end of his three month probationary period because he had difficulties performing some of the tasks equipment operators are required to perform – Parkview also presented evidence regarding its financial difficulties – Once the operations manager decided he would lay off two construction labourers in order to meet the need to reduce costs, he decided to terminate them the same day as the third individual, as he believed this would have less impact on the morale and productivity of the remaining workers – The applicant claimed that the operations manager's explanations were not credible, considering that there was no probationary period in place, and that the cost savings achieved were minimal compared to the financial difficulties the company faced – Furthermore, the employees were, contrary to past practice, laid off mid-week rather than at the end of the week – Finally, the operations manager was aware that an organizing campaign was underway and that the applicant had met with the excavating crew the day before the termination took place – The Board determined that Parkview had met the burden of proof to demonstrate that its decision to terminate the employees in question was not contrary to the Act – While the timing of the termination is very suspicious, there was no evidence of anti-union behaviour or that Parkview had reacted to the

organizing efforts of the applicant in any illegitimate way – Given the operations manager's uncontradicted testimony and the failure to cross-examine him on this point, the Board refused to draw the inference that because the operations manager was aware that there had been a union meeting the day before the terminations, he knew the employees had signed cards during the meeting – Parkview's evidence was complete, consistent and credible, and was not contradicted by the applicant – Finally, Parkview would have had no basis for knowing or even suspecting that the applicant was filing the application for certification the day the dismissals took place – That decision had been made by the applicant's co-ordinators the evening before and they had not informed any Parkview employee – Application dismissed

PARKVIEW HOMES, 149282 ONTARIO INC. AND 1490623 ONTARIO INC., PARKVIEW EXCAVATION SERVICES INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Mar./Apr.) 240

Discharge – Delay – Duty of Fair Representation – The complainant was discharged for alleged neglect of duty and abusive treatment of an individual in his care – The union failed to consider whether to pursue the matter to arbitration until the deadline for making a referral to arbitration had long passed – The matter was subsequently referred to arbitration and the arbitrator found the referral to be untimely and he had no jurisdiction to extend the time limit – The union did not explain this failure and the Board found the union grossly negligent in failing inexplicably to make a decision about what to do with the grievance until well beyond the time frame set out in the collective agreement – The Board directed the parties to meet with an LRO to discuss remedy leaving aside the issue of the impact of *Windsor Western Hospital* on the Board's remedial options in these circumstances, unless it is necessary to deal with that issue – Remedy to be determined – Application granted

CALVIN BRIAN MACLEAN; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA (CAW-CANADA) AND ITS LOCAL 40; RE TOBIAS HOUSE ATTENDANT CARE INC. .....(Jul./Aug.) 427

Discharge – Employment Standards – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the

requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 587

Discharge – Employment Standards – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Nov./Dec.) 587

Discharge – Health and Safety – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a

"course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Sept./Oct.) 549

Discharge – Health and Safety – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Nov./Dec.) 549

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two

employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175..... (Sept./Oct.) 523

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov./Dec.) 523

Duty of Fair Representation – *Colleges Collective Bargaining Act* – Practice and Procedure – The applicant, an employee of the Colleges, made an application under the *Labour Relations Act* asserting that OPSEU had violated s. 74 – OPSEU and the College submitted that the Board had no jurisdiction to hear the complaint since it was filed under the LRA, rather than the CCBA – Pursuant to Rule 40.5 the Board found it advisable to allow the filing to be amended – There was no purpose in dismissing the application: although it was filed on the wrong form, the obligation on the union is the same and the substance of the complaint would have been the same – Furthermore were the complaint dismissed, the applicant could just file again on the proper form and while the time period lapse would be significant, OPSEU and the College could not point to any prejudice, since they would have known the substance of the complaint – Additionally, notwithstanding a long delay (46 months), the Board found the length of the administrative delay and the resulting waning of memories was not the fault of the Board, rather it was a joint effort of the applicant, the College, the union and the Board – The Board noted that it was the College (not the responding party union) bringing the abuse of process motion, and that it, like most responding parties to litigation, was almost certainly of the view that as long as the applicant was not interested in proceeding with

the complaint, it was happy to let it languish – Quite simply, if the College wanted the application to proceed it could have simply written to the Board – Matter continues

CENTENNIAL COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE ADHIN SUKHU; ONTARIO PUBLIC SERVICE EMPLOYEES UNION ..... (Mar./Apr.) 217

Duty of Fair Representation – Delay – Discharge – The complainant was discharged for alleged neglect of duty and abusive treatment of an individual in his care – The union failed to consider whether to pursue the matter to arbitration until the deadline for making a referral to arbitration had long passed – The matter was subsequently referred to arbitration and the arbitrator found the referral to be untimely and he had no jurisdiction to extend the time limit – The union did not explain this failure and the Board found the union grossly negligent in failing inexplicably to make a decision about what to do with the grievance until well beyond the time frame set out in the collective agreement – The Board directed the parties to meet with an LRO to discuss remedy leaving aside the issue of the impact of *Windsor Western Hospital* on the Board's remedial options in these circumstances, unless it is necessary to deal with that issue – Remedy to be determined – Application granted

CALVIN BRIAN MACLEAN; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA (CAW-CANADA) AND ITS LOCAL 40; RE TOBIAS HOUSE ATTENDANT CARE INC. ..... (Jul./Aug.) 427

Duty of Fair Representation – Discharge – Grievance – Timeliness – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to be the case), the then union steward failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

LOUIE SENIA; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 213; RE KINARK CHILD AND FAMILY SERVICES ..... (Jul./Aug.) 469

Duty of Fair Representation – Judicial Review – The applicant sought judicial review of the Board's decision (and reconsideration) dismissing her s. 74 complaint – The Court found that the applicant was merging two issues: the university's decision to terminate her and the union's conduct in failing to adequately challenge the discharge – The Court held that the Board's finding that the union met its statutory obligation was reasonable – Further, there was no denial of natural justice or procedural fairness – Application dismissed

ELZBIETA OLSZEWSKA; RE UNITED STEEL, PAPER AND FORESTRY, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION LOCAL 1998, AND THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO AND OLRB ..... (May/June) 406

Duty to Bargain in Good Faith – *Crown Employees Collective Bargaining Act* – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587..... (Sept./Oct.) 601

Duty to Bargain in Good Faith – *Crown Employees Collective Bargaining Act* – Essential Services – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587.....(Nov./Dec.) 601

Duty to Bargain in Good Faith – Order for Productions – Unfair Labour Practice – AMAPCEO alleged that the Crown had violated s. 17 of the Act when it failed to disclose to AMAPCEO a "secret" agreement to compensate OPSEU bargaining unit members in addition to the amounts published in the parties' signed collective agreement – During the course of the hearing, a confidentiality order was made relating to documents produced – The Crown sought a further permanent confidentiality order with respect to two letters that spelled out the "confidential compensation agreement" and were marked as exhibits in the proceeding – The Crown and OPSEU both argued that the absence of a permanent confidentiality order for the two documents would cause significant labour relations harm – The Board weighed the request for confidentiality against the open court principle – Having already ruled that the allegations of fact, if proven, would constitute a case for some remedial relief, the Board saw no reason to restrict AMAPCEO's ability to refer to the documents publicly – Request denied; matter continues

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; RE OPSEU.....(May/June) 294

Duty to Bargain in Good Faith – Unfair Labour Practice – OPSEU alleged that during bargaining the Art Gallery of Ontario did not disclose all information pertaining to funding for the reconstruction of the Gallery's Learning Centre and how that funding could lead to layoffs in the bargaining unit – OPSEU also claimed that the AGO accelerated the timing of layoffs after the union objected to the layoffs taking place during bargaining – The AGO denied any violation of the Act and asked the Board to exercise its discretion not to inquire into the complaint – The Board held there was no labour relations rationale to inquire into the first part of the complaint: the parties had reached a collective agreement in spite of OPSEU's suspicions, they had relatively stable labour relations, and they were not likely to face another expansion project as collective bargaining was, or was about, to take place – On the second issue, the Board found that there was labour relations rationale for inquiring into OPSEU's allegation of the accelerated layoffs – The Board found that OPSEU's allegations made out a *prima facie* case of a violation of section 70 of the Act – Because the first phase of the layoff schedule was implemented before the collective agreement was reached and because ten employees suffered lost work opportunities as a result of the accelerated layoffs, this portion of the complaint would warrant further inquiry by the Board – Matter continues

ART GALLERY OF ONTARIO; RE OPSEU .....(May/June) 274

Employee – Bargaining Unit – Certification – Dependent Contractor – Trade Union – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers' employers – Hamilton Cab argued in the alternative that, if the single plate owner owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential

element of Hamilton Cab's business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION .....(Jan./Feb.) 43

Employee – Bargaining Unit – Certification – The UFCW sought to certify an "all employee" unit of the employer's workers, with specified exclusions – By letter accompanying the application, the union clarified that in its view temporary agency employees were not the employer's workers – During pre-vote discussions, the vote officer noted, among other things, that the applicant was not seeking to represent temporary agency personnel and the employer asserted that the agency employees were its employees for LRA purposes – At the vote, the applicant challenged every agency employee and, after the vote, the applicant made three further representations that it did not wish to represent the agency personnel or that the temporary employees should be excluded because they did not have "sufficient connection with the workplace" – In the last representation, the applicant sought to amend its bargaining unit description to reflect its original position that agency employees should be excluded – The Board refused to allow the amendment, finding that nowhere on the application or in its cover letter did the UFCW seek to exclude the temporary workers if they were employees of the employer – The Board found that the applicant's challenge to the agency workers was only that they were not employees, not that they should be excluded because, as employees, they did not share a community of interest with the permanent staff – To allow the amendment would give the applicant an opportunity to resile from its earlier agreement to an all-employee unit – Matter continues

PUDDY BROTHERS, A DIVISION OF MAPLE LODGE FARMS LTD.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 .....(Mar./Apr.) 257

Employee – Certification – Construction Industry – Status – On the application filing date the individuals at issue worked less than the majority of the day doing the work of a construction labourer, and the remainder of the day they performed non-construction work for the employer at different sites – The Board first noted that the *Gilvesy* test is used to determine which trade/bargaining unit a worker is in on the application date, if there is a dispute about which trade the employee was working on that date – The Board found that the non-construction work performed by the employees in dispute was covered by separate and distinct provisions of the Act, and that in this particular circumstance there was no more reason to have regard to what the employees in dispute did when they left the construction job site to do non-construction work than there would be in the case of employees who were sent home – The Board found the individuals to be employees in the bargaining unit – Matter continues

JAMWOOD DEVELOPMENTS INC.; CINELLI QUADRA GROUP LTD.; CINELLI, MARIO IN TRUST; CINTREX PROPERTY MANAGEMENT INC.; SURREY CONSTRUCTION INC.; A-MOTION ACCESSIBLE LIFESTYLE SOLUTIONS; A & M WOODWORKING; MAR JAM INVESTMENTS LTD. AND SURREY PLAZA

LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL. .....(Mar./Apr.) 224

Employer – Construction Industry Grievance – Health and Safety – The union alleged the responding party violated the collective agreement when it barred the union's representatives from attending at its job site – The responding party acknowledged barring the representatives because the union refused to provide it with an approved registration as required by the *Occupational Health and Safety Act* – The responding party argued that the union is an "employer" and its representatives attend the job sites as "workers" – Although the collective agreement provides that representatives shall have access to working areas, the responding party argued that complying with the contract would violate a direct order of a health and safety inspector – The Board found that the registration form related to "constructors" and "employers engaged in construction" – The union representatives, like others authorized by law to access the site (police, firefighters, municipal or health and safety inspectors), are not there at the behest of the constructor, nor under the constructor's direction or control – These "employers" are not bound to complete the OHSA form – Grievance allowed

CANTRETROT INVESTMENT LIMITED; H & R DEVELOPMENTS AND/OR; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU .....(May/June) 288

Employer – Employment Standards – The applicant sought review of an order to pay wages to cab drivers who were found to be employees under the ESA – The facts established that the drivers operate vehicles owned by the applicant by entering into a "lease" agreement (with no set lease fee); answer calls broadcast by a dispatcher; receive T-4 slips at the end of the year; are required to abide by the company's rules; have no authority to set fares or fees – In addition, an Employment Standards Officer had earlier determined that the drivers were employees, and the applicant treated them as such for a time – The Board found that the drivers do not own the most important tools of the business (cab, dispatch equipment, meter, signage); there was very little risk of loss or chance of profit; and the applicant could manipulate terms and conditions of employment – all of which pointed to an employment relationship – Application dismissed

1022239 ONTARIO INC. O/A SEVENTY-FIVE HUNDRED TAXI INC., RE. DIRECTOR OF EMPLOYMENT STANDARDS; RE JEREMY BOND; MARK BROWN; STEPHAN DOYLE; GREGG GAPP; PAUL GIBSON; DON INGRAM; ROBERT MCINTOMNEY; DOUGLAS NETHERY; WILLIAM REID; DOUGLAS SHARRARD; PETER STRACHAN; TIMOTHY WIPP; ROBERT HORTON; DOUGLAS RICHARD; GERALD STUBBINGTON; JOHN KENDRICK; STEPHEN WALLS; DAWSON LISINCHUK; NICK SCALI; ALICE SHYMANSKI; STEPHANIE HOWARD; BRAD LACELL; STEWART SZOSTAK; RICHARD WIPP; JASON WHALEN; GORD SCOTT; SAM FOGLIA; DARREN PATRY; JIM WADAS; SHAUN MCKAY; LUKE SMITH; PATRICIA SQUIRES;RAYMOND SAYLOR; RIMAS GASPERAS; ED LAY; MIKE SUPICA; ROB STANCATI; HAROLD DUGUAY; JEFF COUTURIER; KERRY BARNUM; RON WHITE; IAN SHARPE; DARCY BARTLETT; JAMES GRANT; BRANDON PRINTESS.....(Jul./Aug.) 472

Employer – Health and Safety – Reprisal – The applicant alleged that the responding parties violated s. 50 of the OHSA when he was removed as a security guard at Humber College and dismissed from employment by Primary Response – The applicant contended that the closer monitoring he was placed under after he contacted the Ministry of Labour to complain about violations of the Act was a reprisal – Humber moved to have the

application dismissed against it on the grounds that it was neither the employer of the applicant, nor a person acting on behalf of an employer – The Board was satisfied that Humber was a third party to the employment relationship – The applicant failed to provide evidence that Humber was acting on behalf of Primary Response when Humber's employee began monitoring the applicant, or when Humber allegedly advised Primary that it wanted the applicant removed from its facility – Before a person who is neither the nominal nor the actual employer can be subject to this kind of reprisal complaint, the person must have the authority to punish the employee or, at least, affect the individual's employment – Motion by Humber allowed – Matter continues

PRIMARY RESPONSE INC.; HUMBER COLLEGE INSTITUTE OF ADVANCED LEARNING AND TECHNOLOGY; RE GERARD F. DUNPHY ..... (Mar./Apr.) 254

Employer – Reference – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 ..... (Sept./Oct.) 619

Employer – Reference – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 ..... (Nov./Dec.) 619

Employer Support – Certification – Construction Industry – Representation Vote – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

EURO-CAN MASONRY; RE BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA LOCAL 1 .....(Jul./Aug.) 440

Employment Standards – Construction Industry – The main issue was whether the employee was a "construction employee" and as a result, the employer was exempt from paying termination and severance – The employer was in the road building business and met the definition of an employer in the construction industry – The Board noted however that this did not necessarily mean that all of its employees were "construction employees" – In assessing the employee's work the Board found he worked the vast majority of his time off-site in the main yard or shop, and when he did work at the site, it was not to repair roads – Accordingly, since he was not employed at the site, he did not fall within the first branch of the "construction employee" definition – The Board also found that the employee did not meet the other branch of the definition as the employer was not able to establish that the employee was commonly associated with the work of either LIUNA or IUOE members – The employer did not satisfy the Board that the employee was regularly or routinely dispatched to the construction site, nor that his principal duty on site was to repair the machinery – Therefore the employee was not a "construction employee" and was entitled to termination and severance pay – Appeal allowed

COCO PAVING INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DUGAGJIN GJOCAJ.....(Jan./Feb.) 21

Employment Standards – Discharge – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS..... (Sept./Oct.) 587

Employment Standards – Discharge – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter

described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS.....(Nov./Dec.) 587

Employment Standards – Employer – The applicant sought review of an order to pay wages to cab drivers who were found to be employees under the ESA – The facts established that the drivers operate vehicles owned by the applicant by entering into a "lease" agreement (with no set lease fee); answer calls broadcast by a dispatcher; receive T-4 slips at the end of the year; are required to abide by the company's rules; have no authority to set fares or fees – In addition, an Employment Standards Officer had earlier determined that the drivers were employees, and the applicant treated them as such for a time – The Board found that the drivers do not own the most important tools of the business (cab, dispatch equipment, meter, signage); there was very little risk of loss or chance of profit; and the applicant could manipulate terms and conditions of employment – all of which pointed to an employment relationship – Application dismissed

1022239 ONTARIO INC. O/A SEVENTY-FIVE HUNDRED TAXI INC., RE. DIRECTOR OF EMPLOYMENT STANDARDS; RE JEREMY BOND; MARK BROWN; STEPHAN DOYLE; GREGG GAPP; PAUL GIBSON; DON INGRAM; ROBERT MCINTOMNEY; DOUGLAS NETHERY; WILLIAM REID; DOUGLAS SHARRARD; PETER STRACHAN; TIMOTHY WIPP; ROBERT HORTON; DOUGLAS RICHARD; GERALD STUBBINGTON; JOHN KENDRICK; STEPHEN WALLS; DAWSON LISINCHUK; NICK SCALI; ALICE SHYMANSKI; STEPHANIE HOWARD; BRAD LACELL; STEWART SZOSTAK; RICHARD WIPP; JASON WHALEN; GORD SCOTT; SAM FOGLIA; DARREN PATRY; JIM WADAS; SHAUN MCKAY; LUKE SMITH; PATRICIA SQUIRES;RAYMOND SAYLOR; RIMAS GASPERAS; ED LAY; MIKE SUPICA; ROB STANCATI; HAROLD DUGUAY; JEFF COUTURIER; KERRY BARNUM; RON WHITE; IAN SHARPE; DARCY BARTLETT; JAMES GRANT; BRANDON PRINTESS.....(Jul./Aug.) 472

Employment Standards – Judicial Review – The Court found the Board's conclusion that the applicant's employment was terminated for wilful disobedience was a reasonable one – Application Dismissed

TODOR PANDELIEV, RE ONTARIO LABOUR RELATIONS BOARD .....(May/June) 408

Employment Standards – The employee sought to overturn the findings of an ESO disentitling her to a wage differential based on inadequate notice of a change in her pay rate – The employee had been employed with the employer for a period exceeding ten years; the notice of pay reduction took effect three weeks after its issuance; the employee argued the notice period should have been eight weeks, and wanted the difference; she argued that the reduction in pay constituted constructive dismissal; she did not resign from employment – The Board held that the employee would have been entitled to termination pay at her original rate if she had resigned in the face of the pay reduction – By not resigning, she forfeited any entitlement to notice or equivalent pay – Application dismissed for not making out a case for the orders or remedies requested

ADITYA BIRLA MINACS WORLDWIDE INC. o/a ADITYA BIRLA MINACS AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MARCELLE SHAYDA.....(May/June) 271

Employment Standards – The Employer appealed an ESO's Order to Pay for public holiday pay – The Employer was a temporary placement agency whose employees did not have a regular work schedule – Employees would indicate their availability by signing in on the morning of any day for which they wished to be assigned work; work was then assigned based on the availability of work – As the public holidays in question fell on days that would ordinarily be a working day for the employees and the employees were not on vacation, the Board found section 26 of the ESA applied – Section 26(2) prevents employees from claiming public holiday pay if they fail, without reasonable cause, to work all of the last regularly scheduled day of work before the public holiday or all of the first regularly scheduled day of work after the public holiday – The Employer argued that since the employees did not work the day before and after the holiday, they were not entitled to pay – The Board found that the circumstances in which temporary help employees work vary widely and that the exception in s. 26(2) did not apply in this case – The term "regularly scheduled" day of work does not necessarily correspond with the days of operation of the employer – Further, the employees had just cause for not working the day before or after the holiday as this was a term of their employment contract – Order to pay affirmed

137077 CANADA INC. o/a HANDYMAN PERSONNEL INDUSTRIAL DIVISION; RE JONATHAN SULLIVAN AND DIRECTOR OF EMPLOYMENT STANDARDS .....(Jul./Aug.) 409

Employment Standards – The employer applied to review an Employment Standards Officer's order for compensation for violation of the post-pregnancy reinstatement provisions – The employer led evidence to show that it was bound by the settlement of other litigation to eliminate the complainant's position – The Board held that the Act does not require the termination of another person's employment in order to comply with the obligation to reinstate to comparable employment – The Act is designed to protect employees on leave, not to provide greater rights to employees who go on leave than to other employees – Application allowed; order rescinded

JUST ENERGY CORP.; RE BALDEESH (LISA) DHILLON AND DIRECTOR OF EMPLOYMENT STANDARDS.....(May/June) 358

Employment Standards – The employer sought review of an order for wages and compensation, the employment standards officer having found that the employee was entitled to

overtime and was victim of a reprisal – The evidence revealed that the employee and his co-workers were dissatisfied with their wage rate and working conditions, and staged a work refusal to demand their rectification – The Board was persuaded that no overtime was owing to the employees – The Board held further that engaging in (or orchestrating) a work stoppage was wilful misconduct or wilful neglect of duty, and not an exercise of rights under the Act – Application allowed; orders rescinded

ONTARIO LINE CLEARING & TREE SERVICES LIMITED O/A ONTARIO LINE CLEARING & TREE SERVICE; RE GYULA BOGNAR AND DIRECTOR OF EMPLOYMENT STANDARDS.....(May/June) 361

Employment Standards – The employer sought review of an order to pay termination pay to the employee, but did not dispute wages and vacation pay owed – The Board found that the employer had established wilful misconduct in relation to theft of buns, goods intended for sale to the public, disentitling him to notice of termination or termination pay – The Board found the employer's testimony stating that she did not authorize the employee to take the buns to be more detailed and credible than the employee's vague and inconsistent testimony describing the circumstances and frequency with which he was given the product – It is unlikely that the employer would undertake secret surveillance of staff engaging in acts of theft if she authorized the employee to take the buns –The employee's claim that he was terminated because he was Muslim was improbable and not supported by the evidence – Application succeeds in part

GLENDALE BAKERY & DELI INC.; RE NEZDET KASUM AND DIRECTOR OF EMPLOYMENT STANDARDS.....(Jan./Feb.) 29

Employment Standards – This director's appeal of an order to pay vacation pay to a large number of employees of an insolvent company turned on the interpretation of s. 80(4): whether the exempting clauses under subsection (4) should be read disjunctively or conjunctively – The director relied on a statement in a Court of Appeal case that s. 80(4)(a) provides that Part XX does not apply to directors of corporations "that have been incorporated in another jurisdiction" and secondly, that "and" as used in s. 80(4) is used jointly and severally – The Board found that the Court of Appeal, in its two sentence statement on s. 80(4)(a) alone, did not express an opinion on whether subsection 80(4) as a whole was to be read disjunctively or not, and accordingly did not consider the decision binding – The Board noted that a disjunctive interpretation would not be consistent with a fair, large and liberal interpretation of the objects of the Act in that it would have the effect of immunizing directors of for-profit corporations not incorporated within Ontario, while directors of for-profit companies incorporated under Ontario law would be exposed to liability – Secondly, a disjunctive interpretation was also in disharmony with Part XX which makes it clear that whether the employer was incorporated in Ontario or not was irrelevant: the factor which determines the applicability of the Act was where the employee performs the work – Furthermore a disjunctive reading would immunize non-profit corporations under clause (c), which is redundant since s. 80(2) already accomplishes that result – Finally, a conjunctive interpretation was in accord with earlier Board jurisprudence – The Board found that paragraphs (a), (b) and (c) of subsection 80(4) were to be read conjunctively – Application dismissed

PENSLER, SANFORD N., A DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS.....(May/June) 389

Essential Services – *Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – The parties disagreed about whether a valid essential services agreement (ESA)

within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587..... (Sept./Oct.) 601

Essential Services – *Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587.....(Nov./Dec.) 601

Estoppel – Abandonment – Collective Agreement – Construction Industry Grievance – Remedies – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93 .....(May/June) 369

Evidence – Certification – Construction Industry – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted

the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Sept./Oct.) 561

Evidence – Certification – Construction Industry – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board

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ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Nov./Dec.) 561

Evidence – Construction Industry – Practice and Procedure – Witness – The union sought production of witness notes that were protected by litigation privilege – The Board followed the Court's decision in *Kennedy v. McKenzie* which set out a number of exceptions to the claim of privilege – The Board noted that there did exist another reasonable form of evidence that could provide the information that the union sought, namely, the witness may testify under oath before the Board – The Board also noted that while it had the authority to accept the evidence pursuant to s. 111(2)(e), it chose to exercise its discretion to follow the Court's approach in this instance – The Board declined to order the employer to produce the notes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (May/June) 327

Evidence – Construction Industry Grievance – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS ..... (Sept./Oct.) 517

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EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS .....(Nov./Dec.) 517

Evidence – Grievance – Construction Industry – Collective Agreement – During the life of a collective agreement OPG engaged in a construction project that included an electrical portion that made up between 55% to 60% of the total trades work performed - The electrical portion was contracted to a contractor that did not employ the applicant's members – The dispute centred around the meaning of the phrase "predominantly electrical" in Letter of Understanding No. 2 of the collective agreement – Letter of Understanding No. 2 required that "predominantly electrical" work be performed by the applicant's members – To determine the ambiguous meaning of the phrase, the Board permitted the parties to call extrinsic evidence to establish the context within which "predominantly electrical" was negotiated – The Board found that Letter of Understanding No. 2 was intended to provide the applicant with a guaranteed number of hours when the respondent engaged in electrical projects – Initially, the respondent proposed the phrase "exclusively electrical" as a condition of the guarantee, however the applicant rejected this language on the basis that it was too under-inclusive – "Predominantly electrical" was ultimately agreed upon instead – After reviewing the extrinsic evidence, the Board determined that the respondent interpreted the phrase "predominantly electrical" to mean the same thing as "exclusively electrical", effectively a purely electrical project with some very minimal support by other trades – However, the Board was not satisfied that the applicant shared this interpretation and found that in fact, there was no mutual agreement between the parties with respect to the meaning of the phrase – The Board applied the common interpretive principle that words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or the collective agreement read as a whole suggests that a different meaning is intended – The Board found that there was no evidence of context that the parties intended "predominantly electrical" to have a special or different meaning – As a result, the Board found that the words must be given their plain and ordinary meaning – The Board determined that the plain and ordinary meaning of the words "predominantly electrical" was that trades work on the construction project must consist of at least 50% electrical work – The Board found that since the project consisted of 55% – 60% electrical work, the electrical work on the project should have been performed by members of the applicant – Application allowed

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS.....(Jan./Feb.) 82

Evidence – Health and Safety – The responding parties brought a motion to strike certain pleadings of the applicants which relied on transcripts of recordings, surreptitiously taped telephone conversations between some of the individual responding parties – The applicants argued there should be no reasonable expectation of privacy because the conversations took place over a public line and in addition were or could have been overheard by third parties standing near one of the conversants – The Board held that the

evidence sought to be adduced was relevant and, subject to any claims about authenticity, the best evidence as to what was said – Illegally obtained evidence is not, per se, inadmissible – Motion denied – Matter continues

BRIGHTON COURT APARTMENTS c/o REALSTAR MANAGEMENT, BRUCE MAKI, WENDY NASON MAKI, PAUL HALOWATY AND DEBORAH WARREN LOGAR; RE SHAWN MARC AMERLINCK AND MICHAEL-JOHN KNOBLAUCH .....(May/June) 281

Evidence – Practice and Procedure – Termination – Unfair Labour Practice – The employer sought production of notes, which was resisted by the union on the basis of litigation privilege and confidential relationship privilege, taken by a union representative during a meeting, shortly after Dennee (an individual dismissed by the employer) had a discussion with the employer's principal, Scott – Dennee alleged that Scott told him he could get his job back if he could arrange to get all his friends to vote against the union and Scott denied ever asking Dennee to exercise his influence over the other employees – There was no dispute that the notes could constitute cogent and relevant evidence concerning the issues in dispute – On a review of the principles underlying confidential relationship privilege the Board found the key feature was that the communication occur in the context of an employee seeking advice from a union representative concerning an issue to which the union is obligated to give serious consideration – While the meeting between Dennee and the union representatives may have involved a discussion of his dismissal and the possibility of a grievance, the employer was not interested in this information and any references to it may be redacted from the notes – Another possible purpose of the meeting may have been to describe what just occurred in Dennee's discussion with Scott – Given that there was no evidence suggesting that Dennee was seeking advice from the union about how his conversation with Scott might assist him in his termination application (or any grievance), the Board could not see how a confidential relationship privilege existed – The Board found no connection between Dennee's dismissal and the application for termination, as they were fundamentally not the same litigation, and accordingly whatever litigation privilege may have existed did not extend to the application for termination of bargaining rights – As neither privilege attached, given the cogency and relevance of the notes, the Board ordered production – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; RE DEBBIE GIBSON..... (Mar./Apr.) 232

Grievance – Construction Industry – Evidence – Collective Agreement – During the life of a collective agreement OPG engaged in a construction project that included an electrical portion that made up between 55% to 60% of the total trades work performed - The electrical portion was contracted to a contractor that did not employ the applicant's members – The dispute centred around the meaning of the phrase "predominantly electrical" in Letter of Understanding No. 2 of the collective agreement – Letter of Understanding No. 2 required that "predominantly electrical" work be performed by the applicant's members – To determine the ambiguous meaning of the phrase, the Board permitted the parties to call extrinsic evidence to establish the context within which "predominantly electrical" was negotiated – The Board found that Letter of Understanding No. 2 was intended to provide the applicant with a guaranteed number of hours when the respondent engaged in electrical projects – Initially, the respondent proposed the phrase "exclusively electrical" as a condition of the guarantee, however the applicant rejected this language on the basis that it was too under-inclusive – "Predominantly electrical" was ultimately agreed upon instead – After reviewing the

extrinsic evidence, the Board determined that the respondent interpreted the phrase "predominantly electrical" to mean the same thing as "exclusively electrical", effectively a purely electrical project with some very minimal support by other trades – However, the Board was not satisfied that the applicant shared this interpretation and found that in fact, there was no mutual agreement between the parties with respect to the meaning of the phrase – The Board applied the common interpretive principle that words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or the collective agreement read as a whole suggests that a different meaning is intended – The Board found that there was no evidence of context that the parties intended "predominantly electrical" to have a special or different meaning – As a result, the Board found that the words must be given their plain and ordinary meaning – The Board determined that the plain and ordinary meaning of the words "predominantly electrical" was that trades work on the construction project must consist of at least 50% electrical work – The Board found that since the project consisted of 55% – 60% electrical work, the electrical work on the project should have been performed by members of the applicant – Application allowed

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS.....(Jan./Feb.) 82

Grievance – Discharge – Duty of Fair Representation – Timeliness – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to be the case), the then union steward failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

LOUIE SENIA; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 213; RE KINARK CHILD AND FAMILY SERVICES.....(Jul./Aug.) 469

Health and Safety – Construction Industry – Four different construction contractors filed individual applications pursuant to section 61(1) of the *Occupational Health and Safety Act* (OHSA) involving incidents concerning the operations of tower cranes and subsequent Orders made by various Ministry of Labour Inspectors – In each situation the Inspector required the contractor to produce a report by a professional engineer stating that the equipment, machine or device "was not likely to endanger a worker" pursuant to section 54(1)(k) of the OHSA – Each of the applicants retained an engineering firm who produced reports which were deemed to be unacceptable by the various Inspectors because they did not use the specific phrase "not likely to endanger a worker" – The applicants argued that the engineers' reports should not have to use this specific wording – The Board found that section 54(1)(k) of the OHSA clearly reflects the intent of the Legislature to require the employer to provide a report written by a professional engineer that precisely states that the equipment, machine or device is "not likely to endanger a worker" – The Board stated that these precise words create consistency of assessment and minimize confusion or debate among inspectors as to what benchmark must be reached in the content of an engineer's report – The Board was of the view that it was

reasonable for an Inspector to conclude that if a professional engineer's report did not state that the equipment, machine or device was "not likely to endanger a worker", a danger or hazard persisted and a stop work order was necessary – The Board also noted that the Inspectors' decisions in these cases not to lift the stop work orders or non-use restrictions were justified, as many of the conditions which gave rise to the orders were not resolved – In conclusion, the Board found that all four construction contractors in these applications were not in compliance with the Inspectors' Orders and dismissed the applicants' appeals

HARDWALL CONSTRUCTION LTD.; RE, THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNIVERSAL WORKERS UNION L.I.U.N.A. LOCAL 183, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND NEIL MARTIN, INSPECTOR; ET AL.....(May/June) 329

Health and Safety – Construction Industry – *Trades Qualification and Apprenticeship Act* – The Carpenters were used to install certain prefabricated cup sinks and faucets in the countertop during the construction of the new laboratory – An inspector issued an Order that the work must be done by plumbers pursuant to the Regulations under the TQAA – The Board found that the installation of the sinks and faucets (by placing them in the holes and bolting them down) was a part of installing the counters themselves – Therefore, as built in fixtures, the work was carpenters' work within the meaning of the Regulations – The Board made it clear it was not concluding that the work was not plumbers' work, rather only that it was not exclusively plumbers' work according to the Regulations – Given one exception (the threading of copper lines in the hot and cold faucets was not work connected to the installation of the counters and accordingly belonged exclusively to the plumbers), the Board allowed the appeal

ACTION GROUP INC. AND DAN DIGNARD, INSPECTOR; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 .....(Jul./Aug.) 418

Health and Safety – Construction Industry – *Trades Qualification and Apprenticeship Act* – The Carpenters appealed an Order of the Inspector finding that mounting bed locator frames in hospital rooms was performed contrary to the regulations under the OHSA and the TQAA – The Board found that the primary function of the frames was to provide the precise location for the beds through the use of the fixed headboards, so that they can be easily and accurately lined up under the head walls – Although the frames included electrical fixtures, apparatus and conductor enclosures , the Board found the frames were not electrical fixtures, apparatus and conductor enclosures in and of themselves, but rather built-in fixtures – The fact that the Carpenters pulled the electrical conduit through the holes in the frames was no different from when they cut holes in drywall and pulled conduit through the drywall – Once they have pulled the conduit through the frame they did not run the conduit through the raceways or make any electrical connections – Inspector's order rescinded

ELLIS-DON CORPORATION AND DAN DIGNARD, INSPECTOR; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1946 .....(Jul./Aug.) 432

Health and Safety – Construction Industry Grievance – Employer – The union alleged the responding party violated the collective agreement when it barred the union's representatives from attending at its job site – The responding party acknowledged barring the representatives because the union refused to provide it with an approved registration as required by the *Occupational Health and Safety Act* – The responding party argued that the union is an "employer" and its representatives attend the job sites as "workers" – Although the collective agreement provides that representatives shall have access to working areas, the responding party argued that complying with the contract would violate a direct order of a health and safety inspector – The Board found that the registration form related to "constructors" and "employers engaged in construction" – The union representatives, like others authorized by law to access the site (police, firefighters, municipal or health and safety inspectors), are not there at the behest of the constructor, nor under the constructor's direction or control – These "employers" are not bound to complete the OHSA form – Grievance allowed

CANTRETROT INVESTMENT LIMITED; H & R DEVELOPMENTS AND/OR; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU .....(May/June) 288

Health and Safety – Discharge – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Sept./Oct.) 549

Health and Safety – Discharge – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the

merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Nov./Dec.) 549

Health and Safety – Employer – Reprisal – The applicant alleged that the responding parties violated s. 50 of the OHSA when he was removed as a security guard at Humber College and dismissed from employment by Primary Response – The applicant contended that the closer monitoring he was placed under after he contacted the Ministry of Labour to complain about violations of the Act was a reprisal – Humber moved to have the application dismissed against it on the grounds that it was neither the employer of the applicant, nor a person acting on behalf of an employer – The Board was satisfied that Humber was a third party to the employment relationship – The applicant failed to provide evidence that Humber was acting on behalf of Primary Response when Humber's employee began monitoring the applicant, or when Humber allegedly advised Primary that it wanted the applicant removed from its facility – Before a person who is neither the nominal nor the actual employer can be subject to this kind of reprisal complaint, the person must have the authority to punish the employee or, at least, affect the individual's employment – Motion by Humber allowed – Matter continues

PRIMARY RESPONSE INC.; HUMBER COLLEGE INSTITUTE OF ADVANCED LEARNING AND TECHNOLOGY; RE GERARD F. DUNPHY; ..... (Mar./Apr.) 254

Health and Safety – Evidence – The responding parties brought a motion to strike certain pleadings of the applicants which relied on transcripts of recordings, surreptitiously taped telephone conversations between some of the individual responding parties – The applicants argued there should be no reasonable expectation of privacy because the conversations took place over a public line and in addition were or could have been overheard by third parties standing near one of the conversants – The Board held that the evidence sought to be adduced was relevant and, subject to any claims about authenticity, the best evidence as to what was said – Illegally obtained evidence is not, per se, inadmissible – Motion denied – Matter continues

BRIGHTON COURT APARTMENTS c/o REALSTAR MANAGEMENT, BRUCE MAKI, WENDY NASON MAKI, PAUL HALOWATY AND DEBORAH WARREN LOGAR; RE SHAWN MARC AMERLINCK AND MICHAEL-JOHN KNOBLAUCH .....(May/June) 281

Health and Safety – Judicial Review – Blue Mountain sought review of a Board decision finding that the employer had violated the *Occupational Health and Safety Act* by failing to report the death of a guest who drowned in an unsupervised swimming pool at the resort – The Board had upheld the health and safety inspector's finding that a "person" included a guest and a "workplace" included the pool – On review, the Court agreed that the word "person" should be construed in its ordinary meaning and encompasses more than just workers – Conditions and hazards that result in the death of a non-worker could cause similar harm to workers – The Court held, however, that the Board's interpretation of "workplace" was unnecessarily broad and conflated the proprietary interests of the applicant with the statutory definition of workplace – Overall, the Board's decision was not unreasonable – Application dismissed

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB; RE CONSERVATION ONTARIO .....(May/June) 401

Health and Safety – The employer appealed an order from a health and safety inspector requiring it to comply with the training programs for surface mine operations – The employer grows, harvests and processes sedge-grass peat – The employer and the Ministry were at odds regarding the compass of the definition of "surface mine" – The Board found that the operation of the employer had no relation to the supply of material for construction, industrial or manufacturing purposes, therefore it could not be captured by the impugned definition – Appeal allowed; orders rescinded

ZEPHYR PEAT LAND HARVESTING; RE JAMES MILNE, INSPECTOR.....(May/June) 397

Heath and Safety – Reprisal – An employee brought an application alleging that his employer took unlawful reprisals against him contrary to s. 50 of the OHSA for refusing to perform work in unsafe circumstances – The employer does steel fabrication work and provides painting and other related services – The employee alleged that his safety mask, used to protect him from inhaling the fumes of paint he applied, was defective – He was discharged – He sought compensation for lost wages; for being sent home for refusing to perform painting work; and as a result of a suspension imposed for committing errors on the job and for insubordination – The Board found the employer did not raise any doubt about the reasonableness of the employee's concerns about the mask – Notwithstanding any contribution on the employee's part to the deterioration of the mask, the Board found that the employee's work refusal was justified – The Board considered the shortness of time between the work refusal and the discipline, and the length of time between the alleged misconduct and the penalty imposed as factors indicating a reprisal took place – Because the employer was under no responsibility to pay the employee for hours missed as a result of the work refusal (as no evidence was provided to demonstrate other work was available), the Board did not award the employee lost wages for being sent home until a new mask arrived – However, the Board did award him compensation for the two weeks of lost wages he incurred as a result of the suspension – Application granted

CAMERON STEEL INC.; RE NEIL HAINES.....(Jan./Feb.) 11

Hospital Labour Disputes Arbitration Act – Collective Agreement – Interest Arbitrations – Termination – The applicant applied for a declaration that the union no longer represented the employees in its bargaining unit – The union argued that the application was untimely because several clauses of an interest arbitration award that was issued to the parties were still in dispute – The employer claimed that there were no outstanding issues with the arbitration award – Concerning timeliness, the Board considered whether the arbitration award determined a collective agreement under section 12(2) of the *Hospital Labour Disputes Arbitration Act* and s. 63(2) of the Act, and found that it did; the application was therefore timely – The Board noted that the arbitrator's introductory remarks indicated that the agreed-upon items were to be incorporated into the collective agreement and that the arbitrator would only remain seized to address implementation issues – The Board also cited the fact that the arbitrator indicated the term of the collective agreement settled by the award, and the fact that the union had given notice to bargain as evidence that a collective agreement had been determined – The fact that the parties had not signed or prepared a formal collective agreement was inconsequential to the Board's finding that a collective agreement did exist – Termination application continues

PALISADES RETIREMENT RESIDENCE INC.; RE CLAUDETTE BRADSHAW; RE HOSPITALITY & SERVICES TRADES UNION LOCAL 261 .....(May/June) 382

Interest Arbitrations – Collective Agreement – *Hospital Labour Disputes Arbitration Act* – Termination – The applicant applied for a declaration that the union no longer represented the employees in its bargaining unit – The union argued that the application was untimely because several clauses of an interest arbitration award that was issued to the parties were still in dispute – The employer claimed that there were no outstanding issues with the arbitration award – Concerning timeliness, the Board considered whether the arbitration award determined a collective agreement under section 12(2) of the *Hospital Labour Disputes Arbitration Act* and s. 63(2) of the Act, and found that it did; the application was therefore timely – The Board noted that the arbitrator's introductory remarks indicated that the agreed-upon items were to be incorporated into the collective agreement and that the arbitrator would only remain seized to address implementation issues – The Board also cited the fact that the arbitrator indicated the term of the collective agreement settled by the award, and the fact that the union had given notice to bargain as evidence that a collective agreement had been determined – The fact that the parties had not signed or prepared a formal collective agreement was inconsequential to the Board's finding that a collective agreement did exist – Termination application continues

PALISADES RETIREMENT RESIDENCE INC.; RE CLAUDETTE BRADSHAW; RE HOSPITALITY & SERVICES TRADES UNION LOCAL 261 .....(May/June) 382

Interference with Trade Unions – Interim Relief – Remedies – Unfair Labour Practice – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the

interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JOSEPH S. MANCINELLI; RONALD A. PINK; COSMO MANNELLA; RE JACK OLIVIERA; LUIS CAMARA .....(Jul./Aug.) 442

Interim Relief – Bargaining Rights – Intervenor – Practice and Procedure – Trade Union – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION .....(Jan./Feb.) 114

Interim Relief – Certification – Unfair Labour Practice – The Board held a consultation into the discharge of one employee during an organizing drive – In its analysis of the relevant criteria, the Board determined that the employer's rationale for dismissing the employee six weeks after the alleged incident giving rise to the discipline was too remote and unpersuasive – More significantly, the Board looked at the irreparable harm to the union, and the expressed fears of employees who would have to testify in the unfair labour practice complaint – If the conclusions reached by the employees regarding links between the campaign and the employee's discharge are not corrected, growing erosion of union support may not be stemmed – Reinstatement ordered

AUTHENTECH COMMUNICATIONS CANADA INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 203

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175..... (Sept./Oct.) 523

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov./Dec.) 523

Interim Relief – Interference with Trade Unions – Remedies – Unfair Labour Practice – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the

proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JOSEPH S. MANCINELLI; RONALD A. PINK; COSMO MANNELLA; RE JACK OLIVIERA; LUIS CAMARA .....(Jul./Aug.) 442

Intervenor – Bargaining Rights – Interim Relief – Practice and Procedure – Trade Union – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION .....(Jan./Feb.) 114

Intervenor – Judicial Review – Standing – Two intervenors brought motions for standing on a judicial review application brought by Blue Mountain to challenge the Board's interpretation of "person" in s. 51(1) of OHSA – The Board found that "person" was not restricted to "worker" – Conservation Ontario argued the Board's interpretation could pose a direct and significant risk to its day-to-day operations – The Association of Chiefs of Police suggested that the Board's view, if upheld, will negatively affect the cost of providing police services throughout Ontario – The Motions Judge ruled that

Conservation Ontario will provide a broader context from which the court can evaluate the purpose of the legislation and interpret the impugned provision, but the Chiefs of Police were attempting to introduce a new ground for review of the Board's decision that will unnecessarily delay the application for judicial review – Orders accordingly

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB ..... (Mar./Apr.) 264

Intervenor – Judicial Review – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA ..... (Sept./Oct.) 652

Intervenor – Judicial Review – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request

on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA .....(Nov./Dec.) 652

Intimidation and Coercion – Certification Where Act Contravened – The union alleged that the responding employer and named individuals violated sections 70, 72, and 76 of the Act – The union requested relief under section 11 of the Act – The union asserted that the employer fired eight employees after the employer learned that the union was obtaining signed membership cards – The employer denied that it had violated the Act and claimed that the layoffs were due to a shortage of work – The Board found that the employer violated the Act when it laid off the employees for exercising protected rights under the Act and it hindered the employees' right to select or be represented by a trade union – The Board ordered the certification of the union under section 11 of the Act, as no other remedy would sufficiently counter the effects of the violation – The Board added that it would remain seized to determine any compensation to employees and ordered the employer to post copies of the decision and a Notice to Employees about the decision in the workplace

FINN WAY GENERAL CONTRACTORS INC., DAVID KARIMI, JEFF BEDARD, PAT OUELETTE AND FRANK BISIGNANO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669.....(May/June) 307

Judicial Review – Certification – Construction Industry – Practice and Procedure – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position

regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

RONI EXCAVATING LIMITED AND/OR 865217 ONTARIO INC. O/A IRON EXCAVATING AND GRADING AND/OR NIRO BROS. EXCAVATING & GRADING INC. AND/OR IRON TRIO INC. AND/OR ORIN LANDSCAPING, RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793....(Jul./Aug.) 511

Judicial Review – Certification – Related Employer – KAS sought judicial review of the Board's decision declaring KAS and Metro Waste a related employer – KAS argued it was unreasonable for the Board to proceed with a s. 1(4) analysis without having first concluded it was impossible to ascertain who the "true" employer is – KAS also argued it was unreasonable for the Board to invoke s. 1(4) in the absence of any identifiable labour relations mischief – The Court held the Board's reasons as a whole gave appropriate consideration to the criteria for the operation of s. 1(4), and indeed identified three different forms of labour relations mischief – Application dismissed

KAS GROUP OF COMPANIES; RE TEAMSTERS LOCAL UNION NO. 419, METRO WASTE PAPER RECOVERY INC., c.o.b. METRO MUNICIPAL RECYCLING SERVICES INC.....(Jan./Feb.) 185

Judicial Review – *Charter of Rights and Freedoms* – Construction Industry – Non-Construction Employer – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1. – Section 127.2 of the Act was declared constitutionally inoperative in the circumstances of this case – The Court reviewed *Health Services* and determined that the first question to answer was whether s. 127.2, either in its purpose or effect, substantially interfered with the process of collective bargaining – First, the court found that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions" – The Court noted that had the Board granted the declaration sought by IESO, no employee of IESO would have been affected by the termination of the collective agreements and the termination of bargaining rights of the Unions; and based on the evidence, no future employees of the IESO would be denied benefits under these collective agreements – The court found that the effect of the Board's decision was to protect the collective agreements and acquired bargaining rights of the Unions and their members under the construction industry provisions – In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining – The Court found this was an error in law "as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome, rather, it protects the collective bargaining process from substantial interference" – The court found that the legislation did not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work – Finally the court found that if there was a breach of s. 2(d) of the *Charter*, s. 127.2 is nevertheless constitutional as it is a reasonable limit within s. 1 of the *Charter* – Application granted – Matter referred back to the Board to issue a declaration in accordance with s. 127.2

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO (Jan./Feb.) 166

Judicial Review – Construction Industry Grievance – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING

AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD..... (Sept./Oct.) 629

Judicial Review – Construction Industry Grievance – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 629

Judicial Review – Construction Industry Grievance –The Board had decided that OPG, although not the direct employer, was exercising power in respect of the grievor's employment when it banned him from its sites, that its actions came within the scope of the EPSCA Agreement, and that it had to establish that those actions met the standard of the Agreement (see [2010] OLRB Rep. March/April 298) – The Court found this was a preliminary ruling on the arbitrability of the grievance, noted that the Court does not generally entertain judicial review of a preliminary ruling while a proceeding is pending before a tribunal and was not persuaded there were any exceptional circumstances to deviate from that in this case – Application was quashed as premature

ONTARIO POWER GENERATION INC.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA..... (Mar./Apr.) 269

Judicial Review – Duty of Fair Representation – The applicant sought judicial review of the Board's decision (and reconsideration) dismissing her s. 74 complaint – The Court found that the applicant was merging two issues: the university's decision to terminate her and the union's conduct in failing to adequately challenge the discharge – The Court held that the Board's finding that the union met its statutory obligation was reasonable – Further, there was no denial of natural justice or procedural fairness – Application dismissed

ELZBIETA OLSZEWSKA; RE UNITED STEEL, PAPER AND FORESTRY, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION LOCAL 1998, AND THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO AND OLRB.....(May/June) 406

Judicial Review – Employment Standards – The Court found the Board's conclusion that the applicant's employment was terminated for wilful disobedience was a reasonable one – Application Dismissed

TODOR PANDELIEV, RE ONTARIO LABOUR RELATIONS BOARD .....(May/June) 408

Judicial Review – Health and Safety – Blue Mountain sought review of a Board decision finding that the employer had violated the *Occupational Health and Safety Act* by failing to report the death of a guest who drowned in an unsupervised swimming pool at the resort – The Board had upheld the health and safety inspector's finding that a "person" included a guest and a "workplace" included the pool – On review, the Court agreed that the word "person" should be construed in its ordinary meaning and encompasses more than just workers – Conditions and hazards that result in the death of a non-worker could cause similar harm to workers – The Court held, however, that the Board's interpretation of "workplace" was unnecessarily broad and conflated the proprietary interests of the applicant with the statutory definition of workplace – Overall, the Board's decision was not unreasonable – Application dismissed

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB; RE CONSERVATION ONTARIO .....(May/June) 401

Judicial Review – Intervenor – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the

UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA ..... (Sept./Oct.) 652

Judicial Review – Intervenor – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the

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PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA .....(Nov./Dec.) 652

Judicial Review – Intervenor –Standing – Two intervenors brought motions for standing on a judicial review application brought by Blue Mountain to challenge the Board's interpretation of "person" in s. 51(1) of OHSA – The Board found that "person" was not restricted to "worker" – Conservation Ontario argued the Board's interpretation could pose a direct and significant risk to its day-to-day operations – The Association of Chiefs of Police suggested that the Board's view, if upheld, will negatively affect the cost of providing police services throughout Ontario – The Motions Judge ruled that Conservation Ontario will provide a broader context from which the court can evaluate the purpose of the legislation and interpret the impugned provision, but the Chiefs of Police were attempting to introduce a new ground for review of the Board's decision that will unnecessarily delay the application for judicial review – Orders accordingly

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB;..... (Mar./Apr.) 264

Judicial Review – Procedural Fairness – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB... (Sept./Oct.) 669

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VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB...(Nov./Dec.) 669

Jurisdictional Dispute – Construction Industry – The work in this dispute fell within the heavy engineering sector of the construction industry and consisted of carpentry forming work performed at the East Hamilton Recreational Trail and Waterfront Link Pedestrian Bridge – The City of Hamilton, which had previously recognized the Carpenters in the ICI sector, let a contract for the construction of the bridge with a special provision that required bidders to perform heavy engineering sector work covered under the Carpenters' collective agreement in accordance with that agreement – Dufferin was the successful bidder but was not bound to the Carpenters in the heavy engineering sector – Dufferin subcontracted to Alliance which was bound to both the Carpenters and Labourers – Alliance assigned the work in dispute to the Carpenters and the non-concrete forming work to the Labourers – The Labourers filed a grievance and a jurisdictional dispute against Alliance – A primary issue was the identity of the employer, and which party's work assignment practices should be considered – The Board found that where the owner of a project had one or more relevant collective bargaining obligations and contracted the work in dispute to a general contractor, those collective bargaining obligations are factors that the Board would consider in jurisdictional disputes – As a result the Board considered the work assignment practices of Alliance, Dufferin and the City – In determining the jurisdictional dispute, the Board focused on three critical factors; collective bargaining relationships, employer practice and area practice – The practice evidence of the City, Dufferin and Alliance weighed in favour of the assignment of work in dispute to the Labourers – The area practice very strongly favoured the assignment of the disputed work to the Labourers – Both collective agreements covered the work in dispute – The Board determined that the work should have been assigned to the Labourers and the existence of a collective agreement between the Carpenters and the City was insufficient on its own to outweigh the employer and area practices which strongly favoured the Labourers – Application allowed

ALLIANCE VERDI CIVIL INC., UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18, DUFFERIN CONSTRUCTION COMPANY AND THE CITY OF HAMILTON; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837 .....(Jan./Feb.) 1

Natural Justice – Judicial Review – Intervenor – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding

the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA ..... (Sept./Oct.) 652

Natural Justice – Judicial Review – Intervenor – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and

deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA .....(Nov./Dec.) 652

Non-Construction Employer – *Charter of Rights and Freedoms* – Construction Industry – Judicial Review – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1. – Section 127.2 of the Act was declared constitutionally inoperative in the circumstances of this case – The Court reviewed *Health Services* and determined that the first question to answer was whether s. 127.2, either in its purpose or effect, substantially interfered with the process of collective bargaining – First, the court found that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions" – The Court noted that had the Board granted the declaration sought by IESO, no employee of IESO would have been affected by the termination of the collective agreements and the termination of bargaining rights of the Unions; and based on the evidence, no future employees of the IESO would be denied benefits under these collective agreements – The court found that the effect of the Board's decision was to protect the collective agreements and acquired bargaining rights of the Unions and their members under the construction industry provisions – In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining – The Court found this was an error in law "as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome, rather, it protects the collective bargaining process from substantial interference" – The court found that the legislation did not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work – Finally the court found that if there was a breach of s. 2(d) of the *Charter*, s. 127.2 is nevertheless constitutional as it is a reasonable limit within s. 1 of the *Charter* – Application granted – Matter referred back to the Board to issue a declaration in accordance with s. 127.2

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO.(Jan./Feb.) 166

Order for Productions – Duty to Bargain in Good Faith – Unfair Labour Practice – AMAPCEO alleged that the Crown had violated s. 17 of the Act when it failed to disclose to AMAPCEO a "secret" agreement to compensate OPSEU bargaining unit members in addition to the amounts published in the parties' signed collective agreement – During the course of the hearing, a confidentiality order was made relating to documents produced – The Crown sought a further permanent confidentiality order with respect to two letters that spelled out the "confidential compensation agreement" and were marked as exhibits in the proceeding – The Crown and OPSEU both argued that the absence of a permanent confidentiality order for the two documents would cause significant labour relations harm – The Board weighed the request for confidentiality against the open court principle – Having already ruled that the allegations of fact, if proven, would constitute a case for some remedial relief, the Board saw no reason to restrict AMAPCEO's ability to refer to the documents publicly – Request denied; matter continues

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; RE OPSEU.....(May/June) 294

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .....(Sept./Oct.) 613

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .....(Nov./Dec.) 613

Practice and Procedure – Bargaining Rights – Interim Relief – Intervenor – Trade Union – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits

of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION ..... (Jan./Feb.) 114

Practice and Procedure – Certification – Construction Industry – Related Employer – Unfair Labour Practice – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE 1702786 ONTARIO INC. ..... (Mar./Apr.) 189

Practice and Procedure – Certification – Construction Industry – Judicial Review – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

RONI EXCAVATING LIMITED AND/OR 865217 ONTARIO INC. O/A IRON EXCAVATING AND GRADING AND/OR NIRO BROS. EXCAVATING &

GRADING INC. AND/OR IRON TRIO INC. AND/OR ORIN LANDSCAPING, RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793....(Jul./Aug.) 511

Practice and Procedure – Certification – Construction Industry – Evidence – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Sept./Oct.) 561

Practice and Procedure – Certification – Construction Industry – Evidence – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility

of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Nov./Dec.) 561

Practice and Procedure – Certification – Unfair Labour Practice – UFCW was overwhelmingly defeated in a certification application in March 2005 – The day before the representation vote was held Wal-Mart filed an unfair labour practice complaint primarily concerned with an assault by an employee (who was also a representative of the UFCW) on another employee – The UFCW also filed a ULP on the same day, which did not address the assault, but made various allegations against Wal-Mart – After failed attempts at mediation, then 27 months of neither party contacting the Board, and then further delays, the Board considered Wal-Mart's motion to have this matter dismissed because there was no labour relations purpose to proceed and because of administrative delay – The Board relied on the following factors, among others, to exercise its discretion to dismiss the application on the basis that there was no labour relations purpose to proceed: the Board had already struck between one third and one half of the UFCW's allegations; the ballots were cast over 6 years ago and the UFCW overwhelmingly lost; the bargaining unit composition had dramatically changed so that two thirds of the current employees were not employed at the time of the incidents; it was not clear that the UFCW could make out a case for the relief it sought; and the cost implications to the parties and the public – Certification application and ULP's dismissed

WAL-MART CANADA CORP.; RE UFCW .....(Jul./Aug.) 490

Practice and Procedure – *Colleges Collective Bargaining Act* – Duty of Fair Representation – The applicant, an employee of the Colleges, made an application under the *Labour Relations Act* asserting that OPSEU had violated s. 74 – OPSEU and the College submitted that the Board had no jurisdiction to hear the complaint since it was filed under the LRA, rather than the CCBA – Pursuant to Rule 40.5 the Board found it advisable to allow the filing to be amended – There was no purpose in dismissing the application: although it was filed on the wrong form, the obligation on the union is the same and the substance of the complaint would have been the same – Furthermore were the complaint dismissed, the applicant could just file again on the proper form and while the time period lapse would be significant, OPSEU and the College could not point to any prejudice, since they would have known the substance of the complaint – Additionally, notwithstanding a long delay (46 months), the Board found the length of the administrative delay and the resulting waning of memories was not the fault of the Board, rather it was a joint effort of the applicant, the College, the union and the Board – The Board noted that it was the College (not the responding party union) bringing the abuse of process motion, and that it, like most responding parties to litigation, was almost certainly of the view that as long as the applicant was not interested in proceeding with the complaint, it was happy to let it languish – Quite simply, if the College wanted the application to proceed it could have simply written to the Board – Matter continues

CENTENNIAL COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE ADHIN SUKHU; ONTARIO PUBLIC SERVICE EMPLOYEES UNION..... (Mar./Apr.) 217

Practice and Procedure – Construction Industry – Evidence – Witness – The union sought production of witness notes that were protected by litigation privilege – The Board followed the Court's decision in *Kennedy v. McKenzie* which set out a number of exceptions to the claim of privilege – The Board noted that there did exist another reasonable form of evidence that could provide the information that the union sought, namely, the witness may testify under oath before the Board – The Board also noted that while it had the authority to accept the evidence pursuant to s. 111(2)(e), it chose to exercise its discretion to follow the Court's approach in this instance – The Board declined to order the employer to produce the notes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(May/June) 327

Practice and Procedure – Discharge – Health and Safety – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the

Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Sept./Oct.) 549

Practice and Procedure – Discharge – Health and Safety – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Nov./Dec.) 549

Practice and Procedure – Evidence – Termination – Unfair Labour Practice – The employer sought production of notes, which was resisted by the union on the basis of litigation privilege and confidential relationship privilege, taken by a union representative during a meeting, shortly after Dennee (an individual dismissed by the employer) had a discussion with the employer's principal, Scott – Dennee alleged that Scott told him he could get his job back if he could arrange to get all his friends to vote against the union and Scott denied ever asking Dennee to exercise his influence over the other employees – There was no dispute that the notes could constitute cogent and relevant evidence concerning the issues in dispute – On a review of the principles underlying confidential relationship

privilege the Board found the key feature was that the communication occur in the context of an employee seeking advice from a union representative concerning an issue to which the union is obligated to give serious consideration – While the meeting between Dennee and the union representatives may have involved a discussion of his dismissal and the possibility of a grievance, the employer was not interested in this information and any references to it may be redacted from the notes – Another possible purpose of the meeting may have been to describe what just occurred in Dennee's discussion with Scott – Given that there was no evidence suggesting that Dennee was seeking advice from the union about how his conversation with Scott might assist him in his termination application (or any grievance), the Board could not see how a confidential relationship privilege existed – The Board found no connection between Dennee's dismissal and the application for termination, as they were fundamentally not the same litigation, and accordingly whatever litigation privilege may have existed did not extend to the application for termination of bargaining rights – As neither privilege attached, given the cogency and relevance of the notes, the Board ordered production – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; RE DEBBIE GIBSON..... (Mar./Apr.) 232

Procedural Fairness – Judicial Review – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB... (Sept./Oct.) 669

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VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB...(Nov./Dec.) 669

Project Agreement – Construction Industry – The Local gave a timely notice of disapproval of the project agreement pursuant to s. 163.1(8) – The project agreement proposed that the application of the Provincial Collective Agreements to the project would be amended by a reduction in wages by 5% and a standard work week of five, 8 hour days with overtime only after 40 hours – The Local argued the Project Agreement created a greater rate of reduction in "total wages and benefits" paid to its members compared to other trades – The Board agreed with the conclusion in *Shell Canada Products* that the application of a straight percentage reduction to employees who have their normal work week increased with premium pay becoming payable only after they work in excess of the lengthened

work week, increases the proportional reduction of their total wages and benefits – The Board rejected other arguments from SCA that the Local was improperly benefiting by its objection or it was acting in bad faith when it noted that there could be nothing improper about a trade union seeking to obtain a result that is mandated by the Act – The Board concluded that the proper manner in which to determine the proportionate reductions in the total wages and benefits of each group of employees represented by a trade is to calculate the total of all hourly payments (other than payments to an employer association fund) that an employer must make under a Provincial Collective Agreement in respect of each hour of work performed by a bargaining unit employee, as compared to the payments an employer is obliged to make for each hour of work of a bargaining unit employee under the Project Agreement, assuming the employee in both cases works a full 40 hour week – Further submissions directed

SARNIA CONSTRUCTION ASSOCIATION AS AGENT FOR NOVA CHEMICALS; RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON, SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL UNION 128, ET AL .....(Jul./Aug.) 460

Public Sector Labour Relations Transition Act – Bargaining Unit – The application arose from the amalgamation of North Bay General Hospital and the Northeast Mental Health Centre to create the North Bay Regional Health Centre – The parties could not agree on whether the Board should maintain the status quo of twelve bargaining units or consolidate them into at least three: service, office and clerical; paramedical; and RN's – The Board found that maintaining the status quo would not be consistent with the purposes of the PSLRTA – The Board noted that the employer's perspective was taken into account unlike certifications in the LRA – The Board also found that amalgamations (in contrast to transfers) create one employer and the prospect of jurisdictional disputes between different bargaining units of employees with similar skills and working in integrated operations would be manifest – The Board was also not persuaded to place the RPNs in a bargaining unit with the RNs for the following reasons: there was no agreement of the parties to do so; the evidence did not establish that the Centre's operational needs would be furthered by such a placement; and it would not be consistent with the purposes of the PSLRTA – The Board determined a number of other issues and ordered a representation vote in relation to the three bargaining units

NORTH EAST MENTAL HEALTH CENTRE ("NEMHC") NORTH BAY GENERAL HOSPITAL ("NBGH"); RE OPSEU, LOCALS 636, 662, 666; ONA LOCALS 2, 20; CUPE LOCALS 139, 1101, 1623, SEIU, LOCAL 1 .....(Jan./Feb.) 67

Reasonable Apprehension of Bias – Certification – Construction Industry – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from

and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 582

Reasonable Apprehension of Bias – Certification – Construction Industry – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Nov./Dec.) 582

Reconsideration – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Sept./Oct.) 613

Reconsideration – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Nov./Dec.) 613

Reconsideration – Construction Industry Grievance – Evidence – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS ..... (Sept./Oct.) 517

Reconsideration – Construction Industry Grievance – Evidence – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to interpret grievances liberally to deal with them on their merits – The Board is a public

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EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS .....(Nov./Dec.) 517

Reconsideration – Discharge – Health and Safety – Practice and Procedure – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI .....(Sept./Oct.) 549

Reconsideration – Discharge – Health and Safety – Practice and Procedure – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has

acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Nov./Dec.) 549

Reference – Employer – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 ..... (Sept./Oct.) 619

Reference – Employer – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343 ..... (Nov./Dec.) 619

Related Employer – Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE 1702786 ONTARIO INC. ..... (Mar./Apr.) 189

Related Employer – Certification – Judicial Review – KAS sought judicial review of the Board's decision declaring KAS and Metro Waste a related employer – KAS argued it was unreasonable for the Board to proceed with a s. 1(4) analysis without having first concluded it was impossible to ascertain who the "true" employer is – KAS also argued it was unreasonable for the Board to invoke s. 1(4) in the absence of any identifiable labour relations mischief – The Court held the Board's reasons as a whole gave appropriate consideration to the criteria for the operation of s. 1(4), and indeed identified three different forms of labour relations mischief – Application dismissed

KAS GROUP OF COMPANIES; RE TEAMSTERS LOCAL UNION NO. 419, METRO WASTE PAPER RECOVERY INC., c.o.b. METRO MUNICIPAL RECYCLING SERVICES INC. ..... (Jan./Feb.) 185

Related Employer – Judicial Review – Intervenor – Natural Justice – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred

in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA ..... (Sept./Oct.) 652

Related Employer – Judicial Review – Intervenor – Natural Justice – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA .....(Nov./Dec.) 652

Related Employer – Sale of a Business – Stay – Union Successor Rights – The union applied to have existing bargaining rights recognized under s. 1(4) and/or s. 69 of the *Labour Relations Act, 1995* – One of the respondents was an undischarged bankrupt – It was argued that proceedings should be stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* which prevents a creditor from engaging in proceedings against a debtor or a debtor's property for the recovery of a claim provable in bankruptcy – The Board found that a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer did not justify a stay in proceedings – Proceedings under s. 1(4) and/or s.69 are not proceedings for the recovery of a claim provable in bankruptcy despite previous Board jurisprudence – Where the trade union or the applicant claims further or additional relief which may involve recovering funds or requiring payment from the bankrupt, then the impact of the BIA, the necessity of a stay and requirement for the union to seek the approval of the bankruptcy court can be considered – Matter continues

MGI PACKERS INC.; MAPLE FREEZERS LIMITED; CONTINENTAL TRADING COMPANY LIMITED; CONTINENTAL MEAT PACKERS INC.; CONTINENTAL TRADING COMPANY INC.; MAPLE FREEZERS INC.; BURNSTAR FINANCIAL HOLDINGS INC.; HENRY MULLER; 1553602 ONTARIO LIMITED; RICHARD CLARE; GENCOR FOODS INC.; 1553603 ONTARIO LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 175 .....(Jul./Aug.) 454

Remedies – Abandonment – Collective Agreement – Construction Industry Grievance – Estoppel – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93 .....(May/June) 369

Remedies – Interference with Trade Unions – Interim Relief – Unfair Labour Practice – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JOSEPH S. MANCINELLI; RONALD A. PINK; COSMO MANNELLA; RE JACK OLIVIERA; LUIS CAMARA .....(Jul./Aug.) 442

Representation Vote – Certification – Construction Industry – Employer Support – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

EURO-CAN MASONRY; RE BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA LOCAL 1 .....(Jul./Aug.) 440

Reprisal – Discharge – Health and Safety – Practice and Procedure – Reconsideration – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this

case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Sept./Oct.) 549

Reprisal – Discharge – Health and Safety – Practice and Procedure – Reconsideration – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI ..... (Nov./Dec.) 549

Reprisal – Employer – Health and Safety – The applicant alleged that the responding parties violated s. 50 of the OHSA when he was removed as a security guard at Humber College and dismissed from employment by Primary Response – The applicant contended that the closer monitoring he was placed under after he contacted the Ministry of Labour to complain about violations of the Act was a reprisal – Humber moved to have the application dismissed against it on the grounds that it was neither the employer of the applicant, nor a person acting on behalf of an employer – The Board was satisfied that Humber was a third party to the employment relationship – The applicant failed to provide evidence that Humber was acting on behalf of Primary Response when Humber's employee began monitoring the applicant, or when Humber allegedly advised Primary that it wanted the applicant removed from its facility – Before a person who is neither the nominal nor the actual employer can be subject to this kind of reprisal complaint, the

person must have the authority to punish the employee or, at least, affect the individual's employment – Motion by Humber allowed – Matter continues

PRIMARY RESPONSE INC.; HUMBER COLLEGE INSTITUTE OF ADVANCED LEARNING AND TECHNOLOGY; RE GERARD F. DUNPHY ..... (Mar./Apr.) 254

Reprisal – Heath and Safety – An employee brought an application alleging that his employer took unlawful reprisals against him contrary to s. 50 of the OHSA for refusing to perform work in unsafe circumstances – The employer does steel fabrication work and provides painting and other related services – The employee alleged that his safety mask, used to protect him from inhaling the fumes of paint he applied, was defective – He was discharged – He sought compensation for lost wages; for being sent home for refusing to perform painting work; and as a result of a suspension imposed for committing errors on the job and for insubordination – The Board found the employer did not raise any doubt about the reasonableness of the employee's concerns about the mask – Notwithstanding any contribution on the employee's part to the deterioration of the mask, the Board found that the employee's work refusal was justified – The Board considered the shortness of time between the work refusal and the discipline, and the length of time between the alleged misconduct and the penalty imposed as factors indicating a reprisal took place – Because the employer was under no responsibility to pay the employee for hours missed as a result of the work refusal (as no evidence was provided to demonstrate other work was available), the Board did not award the employee lost wages for being sent home until a new mask arrived – However, the Board did award him compensation for the two weeks of lost wages he incurred as a result of the suspension – Application granted

CAMERON STEEL INC.; RE NEIL HAINES ..... (Jan./Feb.) 11

Sale of a Business – Related Employer – Stay – Union Successor Rights – The union applied to have existing bargaining rights recognized under s. 1(4) and/or s. 69 of the *Labour Relations Act, 1995* – One of the respondents was an undischarged bankrupt – It was argued that proceedings should be stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* which prevents a creditor from engaging in proceedings against a debtor or a debtor's property for the recovery of a claim provable in bankruptcy – The Board found that a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer did not justify a stay in proceedings – Proceedings under s. 1(4) and/or s.69 are not proceedings for the recovery of a claim provable in bankruptcy despite previous Board jurisprudence – Where the trade union or the applicant claims further or additional relief which may involve recovering funds or requiring payment from the bankrupt, then the impact of the BIA, the necessity of a stay and requirement for the union to seek the approval of the bankruptcy court can be considered – Matter continues

MGI PACKERS INC.; MAPLE FREEZERS LIMITED; CONTINENTAL TRADING COMPANY LIMITED; CONTINENTAL MEAT PACKERS INC.; CONTINENTAL TRADING COMPANY INC.; MAPLE FREEZERS INC.; BURNSTAR FINANCIAL HOLDINGS INC.; HENRY MULLER; 1553602 ONTARIO LIMITED; RICHARD CLARE; GENCOR FOODS INC.; 1553603 ONTARIO LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 175 ..... (Jul./Aug.) 454

Standing – Construction Industry – Unfair Labour Practice – The IUOE argued that Graham had no standing to advance allegations that the union had contravened the Act and, as a consequence, the membership evidence provided in the certification application did not reflect the true wishes of the employees in the bargaining unit – The impugned conduct

suggested intimidation, misrepresentation and/or coercion – Distinguishing earlier jurisprudence, the Board held that an employer does have a legal interest in whether membership evidence that a union relied on to attain certification is a free expression of the employees' wishes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Jan./Feb.) 32

Standing – Judicial Review – Intervenor – Two intervenors brought motions for standing on a judicial review application brought by Blue Mountain to challenge the Board's interpretation of "person" in s. 51(1) of OHSA – The Board found that "person" was not restricted to "worker" – Conservation Ontario argued the Board's interpretation could pose a direct and significant risk to its day-to-day operations – The Association of Chiefs of Police suggested that the Board's view, if upheld, will negatively affect the cost of providing police services throughout Ontario – The Motions Judge ruled that Conservation Ontario will provide a broader context from which the court can evaluate the purpose of the legislation and interpret the impugned provision, but the Chiefs of Police were attempting to introduce a new ground for review of the Board's decision that will unnecessarily delay the application for judicial review – Orders accordingly

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB ..... (Mar./Apr.) 264

Status – Certification – Construction Industry – Employee – On the application filing date the individuals at issue worked less than the majority of the day doing the work of a construction labourer, and the remainder of the day they performed non-construction work for the employer at different sites – The Board first noted that the *Gilvesy* test is used to determine which trade/bargaining unit a worker is in on the application date, if there is a dispute about which trade the employee was working on that date – The Board found that the non-construction work performed by the employees in dispute was covered by separate and distinct provisions of the Act, and that in this particular circumstance there was no more reason to have regard to what the employees in dispute did when they left the construction job site to do non-construction work than there would be in the case of employees who were sent home – The Board found the individuals to be employees in the bargaining unit – Matter continues

JAMWOOD DEVELOPMENTS INC.; CINELLI QUADRA GROUP LTD.; CINELLI, MARIO IN TRUST; CINTREX PROPERTY MANAGEMENT INC.; SURREY CONSTRUCTION INC.; A-MOTION ACCESSIBLE LIFESTYLE SOLUTIONS; A & M WOOD-WORKING; MAR JAM INVESTMENTS LTD. AND SURREY PLAZA LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 224

Stay – Related Employer – Sale of a Business – Union Successor Rights – The union applied to have existing bargaining rights recognized under s. 1(4) and/or s. 69 of the *Labour Relations Act, 1995* – One of the respondents was an undischarged bankrupt – It was argued that proceedings should be stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* which prevents a creditor from engaging in proceedings against a debtor or a debtor's property for the recovery of a claim provable in bankruptcy – The Board found that a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer did not justify a stay in proceedings – Proceedings under s. 1(4)

and/or s.69 are not proceedings for the recovery of a claim provable in bankruptcy despite previous Board jurisprudence – Where the trade union or the applicant claims further or additional relief which may involve recovering funds or requiring payment from the bankrupt, then the impact of the BIA, the necessity of a stay and requirement for the union to seek the approval of the bankruptcy court can be considered – Matter continues

MGI PACKERS INC.; MAPLE FREEZERS LIMITED; CONTINENTAL TRADING COMPANY LIMITED; CONTINENTAL MEAT PACKERS INC.; CONTINENTAL TRADING COMPANY INC.; MAPLE FREEZERS INC.; BURNSTAR FINANCIAL HOLDINGS INC.; HENRY MULLER; 1553602 ONTARIO LIMITED; RICHARD CLARE; GENCOR FOODS INC.; 1553603 ONTARIO LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 175 .....(Jul./Aug.) 454

Termination – Certification – Construction Industry – Timeliness – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely – Applications dismissed

TRUDEL & SONS ROOFING LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51.....(Jul./Aug.) 485

Termination – Collective Agreement – *Hospital Labour Disputes Arbitration Act* – Interest Arbitrations – The applicant applied for a declaration that the union no longer represented the employees in its bargaining unit – The union argued that the application was untimely because several clauses of an interest arbitration award that was issued to the parties were still in dispute – The employer claimed that there were no outstanding issues with the arbitration award – Concerning timeliness, the Board considered whether the arbitration award determined a collective agreement under section 12(2) of the *Hospital Labour Disputes Arbitration Act* and s. 63(2) of the Act, and found that it did; the application was therefore timely – The Board noted that the arbitrator's introductory remarks indicated that the agreed-upon items were to be incorporated into the collective agreement and that the arbitrator would only remain seized to address implementation issues – The Board also cited the fact that the arbitrator indicated the term of the collective agreement settled by the award, and the fact that the union had given notice to bargain as evidence that a collective agreement had been determined – The fact that the parties had not signed or prepared a formal collective agreement was inconsequential to the Board's finding that a collective agreement did exist – Termination application continues

PALISADES RETIREMENT RESIDENCE INC.; RE CLAUDETTE BRADSHAW; RE HOSPITALITY & SERVICES TRADES UNION LOCAL 261 .....(May/June) 382

Termination – Collective Agreement – Timeliness – Application for termination of bargaining rights under s. 63 – The responding union submitted that the application was untimely pursuant to ss. 63(2)(a) because it was not filed within the last three months of the

operation of the collective agreement – The Board found that the application was timely, as the union and employer intended to make the collective agreement retroactive to the date of the expiration of the prior collective agreement – The Board based its finding on the express duration clause set out in several places in the collective agreement and the exercise of a number of important entitlements under the collective agreement including the right to grieve – The two purposes of ss. 58(1) are to provide certainty regarding the term of the collective agreement and to provide a minimum year of peace – In examining the duration of a collective agreement in a mature bargaining relationship, an interpretation that respects both purposes of ss. 58(1) is preferable – The Board may consider the pattern and history of the bargaining relationship when determining retroactivity – In a mature bargaining relationship where a pattern of bargaining has evolved and where collective agreements on their face indicate a duration which runs for a minimum of one year from the expiration of the prior collective agreement, there will be a heavy onus on the party claiming otherwise, even if the collective agreement was ratified or executed at a subsequent date – To find otherwise would potentially wreak havoc on the first purpose of ss. 58(1) and increase inquires by employees or third parties into when an agreement expires – Matter continues

ST. CHARLES VILLAGE LIMITED PARTNERSHIP C.O.B. AS ST. CHARLES VILLAGE; RE JUDY CARRIGAN; SEIU LOCAL 1 CANADA.....(Jan./Feb.) 101

Termination – Evidence – Practice and Procedure – Unfair Labour Practice – The employer sought production of notes, which was resisted by the union on the basis of litigation privilege and confidential relationship privilege, taken by a union representative during a meeting, shortly after Dennee (an individual dismissed by the employer) had a discussion with the employer's principal, Scott – Dennee alleged that Scott told him he could get his job back if he could arrange to get all his friends to vote against the union and Scott denied ever asking Dennee to exercise his influence over the other employees – There was no dispute that the notes could constitute cogent and relevant evidence concerning the issues in dispute – On a review of the principles underlying confidential relationship privilege the Board found the key feature was that the communication occur in the context of an employee seeking advice from a union representative concerning an issue to which the union is obligated to give serious consideration – While the meeting between Dennee and the union representatives may have involved a discussion of his dismissal and the possibility of a grievance, the employer was not interested in this information and any references to it may be redacted from the notes – Another possible purpose of the meeting may have been to describe what just occurred in Dennee's discussion with Scott – Given that there was no evidence suggesting that Dennee was seeking advice from the union about how his conversation with Scott might assist him in his termination application (or any grievance), the Board could not see how a confidential relationship privilege existed – The Board found no connection between Dennee's dismissal and the application for termination, as they were fundamentally not the same litigation, and accordingly whatever litigation privilege may have existed did not extend to the application for termination of bargaining rights – As neither privilege attached, given the cogency and relevance of the notes, the Board ordered production – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; RE DEBBIE GIBSON..... (Mar./Apr.) 232

Timeliness – Certification – Construction Industry – Judicial Review – Practice and Procedure – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had

found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

RONI EXCAVATING LIMITED AND/OR 865217 ONTARIO INC. O/A IRON EXCAVATING AND GRADING AND/OR NIRO BROS. EXCAVATING & GRADING INC. AND/OR IRON TRIO INC. AND/OR ORIN LANDSCAPING, RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793....(Jul./Aug.) 511

Timeliness – Certification – Construction Industry – Termination – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely – Applications dismissed

TRUDEL & SONS ROOFING LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51.....(Jul./Aug.) 485

Timeliness – Collective Agreement – Termination – Application for termination of bargaining rights under s. 63 – The responding union submitted that the application was untimely pursuant to ss. 63(2)(a) because it was not filed within the last three months of the operation of the collective agreement – The Board found that the application was timely, as the union and employer intended to make the collective agreement retroactive to the date of the expiration of the prior collective agreement – The Board based its finding on the express duration clause set out in several places in the collective agreement and the exercise of a number of important entitlements under the collective agreement including the right to grieve – The two purposes of ss. 58(1) are to provide certainty regarding the term of the collective agreement and to provide a minimum year of peace – In examining the duration of a collective agreement in a mature bargaining relationship, an interpretation that respects both purposes of ss. 58(1) is preferable – The Board may consider the pattern and history of the bargaining relationship when determining retroactivity – In a mature bargaining relationship where a pattern of bargaining has evolved and where collective agreements on their face indicate a duration which runs for a minimum of one year from the expiration of the prior collective agreement, there will be a heavy onus on the party claiming otherwise, even if the collective agreement was ratified or executed at a subsequent date – To find otherwise would potentially wreak havoc on the first purpose of ss. 58(1) and increase inquires by employees or third parties into when an agreement expires – Matter continues

ST. CHARLES VILLAGE LIMITED PARTNERSHIP C.O.B. AS ST. CHARLES VILLAGE; RE JUDY CARRIGAN; SEIU LOCAL 1 CANADA.....(Jan./Feb.) 101

Timeliness – Construction Industry Grievance – Judicial Review – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD..... (Sept./Oct.) 629

Timeliness – Construction Industry Grievance – Judicial Review – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to

arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 629

Timeliness – Discharge – Duty of Fair Representation – Grievance – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to

be the case), the then union steward failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

LOUIE SENIA; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 213; RE KINARK CHILD AND FAMILY SERVICES .....(Jul./Aug.) 469

Trade Union – Bargaining Rights – Interim Relief – Intervenor – Practice and Procedure – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION .....(Jan./Feb.) 114

Trade Union – Bargaining Unit – Certification – Dependent Contractor – Employee – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers' employers – Hamilton Cab argued in the alternative that, if the single plate owner owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab

unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential element of Hamilton Cab's business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION .....(Jan./Feb.) 43

Trade Union – Certification – Construction Industry – After finding that the Restoration Council of Ontario (RCO) was a council of trade unions within the meaning of sections 1(1) and 126(1) of the Act, the Board addressed the issue of whether a council of trade unions could have individuals as members – The Board first noted that although the Act defines a trade union as an organization of employees, the case law does not require that it must be an organization of only employees, and that the same reasoning ought to be applied when determining whether an organization is a council of trade unions – The Board went on to find that a council of trade unions once certified is a "trade union" within the meaning of the Act, and that together with s. 12(3) contemplates the possibility of a certified council of trade unions having individuals as members – Finally, if an organization of employees can be a trade union, and an organization of trade unions, once certified, can be a trade union, then surely one entity that encompasses both employees and unions can also be a trade union – Certification granted

A.A.F. CONSTRUCTION; RE THE RESTORATION COUNCIL OF ONTARIO .....(Mar./Apr.) 197

Trades Qualification and Apprenticeship Act – Construction Industry – Health and Safety – The Carpenters were used to install certain prefabricated cup sinks and faucets in the countertop during the construction of the new laboratory – An inspector issued an Order that the work must be done by plumbers pursuant to the Regulations under the TQAA – The Board found that the installation of the sinks and faucets (by placing them in the holes and bolting them down) was a part of installing the counters themselves – Therefore, as built in fixtures, the work was carpenters' work within the meaning of the Regulations – The Board made it clear it was not concluding that the work was not plumbers' work, rather only that it was not exclusively plumbers' work according to the Regulations – Given one exception (the threading of copper lines in the hot and cold faucets was not work connected to the installation of the counters and accordingly belonged exclusively to the plumbers), the Board allowed the appeal

ACTION GROUP INC. AND DAN DIGNARD, INSPECTOR; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 593 .....(Jul./Aug.) 418

Trades Qualification and Apprenticeship Act – Construction Industry – Health and Safety – The Carpenters appealed an Order of the Inspector finding that mounting bed locator frames in hospital rooms was performed contrary to the regulations under the OHSA and the TQAA – The Board found that the primary function of the frames was to provide the

precise location for the beds through the use of the fixed headboards, so that they can be easily and accurately lined up under the head walls – Although the frames included electrical fixtures, apparatus and conductor enclosures , the Board found the frames were not electrical fixtures, apparatus and conductor enclosures in and of themselves, but rather built-in fixtures – The fact that the Carpenters pulled the electrical conduit through the holes in the frames was no different from when they cut holes in drywall and pulled conduit through the drywall – Once they have pulled the conduit through the frame they did not run the conduit through the raceways or make any electrical connections – Inspector's order rescinded

ELLIS-DON CORPORATION AND DAN DIGNARD, INSPECTOR; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1946 .....(Jul./Aug.) 432

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 ..... (Sept./Oct.) 613

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256 .....(Nov./Dec.) 613

Unfair Labour Practice – Bargaining Rights – Interim Relief – Intervenor – Practice and Procedure – Trade Union – Union Successor Rights – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION .....(Jan./Feb.) 114

Unfair Labour Practice – Certification – Construction Industry – Practice and Procedure – Related Employer – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE 1702786 ONTARIO INC.....(Mar./Apr.) 189

Unfair Labour Practice – Certification – Construction Industry – Reasonable Apprehension of Bias – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue

presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Sept./Oct.) 582

Unfair Labour Practice – Certification – Construction Industry – Reasonable Apprehension of Bias – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues (October 17, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Nov./Dec.) 582

Unfair Labour Practice – Certification – Interim Relief – The Board held a consultation into the discharge of one employee during an organizing drive – In its analysis of the relevant criteria, the Board determined that the employer's rationale for dismissing the employee six weeks after the alleged incident giving rise to the discipline was too remote and unpersuasive – More significantly, the Board looked at the irreparable harm to the union,

and the expressed fears of employees who would have to testify in the unfair labour practice complaint – If the conclusions reached by the employees regarding links between the campaign and the employee's discharge are not corrected, growing erosion of union support may not be stemmed – Reinstatement ordered

AUTHENTECH COMMUNICATIONS CANADA INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Mar./Apr.) 203

Unfair Labour Practice – Certification – Practice and Procedure – UFCW was overwhelmingly defeated in a certification application in March 2005 – The day before the representation vote was held Wal-Mart filed an unfair labour practice complaint primarily concerned with an assault by an employee (who was also a representative of the UFCW) on another employee – The UFCW also filed a ULP on the same day, which did not address the assault, but made various allegations against Wal-Mart – After failed attempts at mediation, then 27 months of neither party contacting the Board, and then further delays, the Board considered Wal-Mart's motion to have this matter dismissed because there was no labour relations purpose to proceed and because of administrative delay – The Board relied on the following factors, among others, to exercise its discretion to dismiss the application on the basis that there was no labour relations purpose to proceed: the Board had already struck between one third and one half of the UFCW's allegations; the ballots were cast over 6 years ago and the UFCW overwhelmingly lost; the bargaining unit composition had dramatically changed so that two thirds of the current employees were not employed at the time of the incidents; it was not clear that the UFCW could make out a case for the relief it sought; and the cost implications to the parties and the public – Certification application and ULPs dismissed

WAL-MART CANADA CORP.; RE UFCW .....(Jul./Aug.) 490

Unfair Labour Practice – Construction Industry – Discharge – The Union brought an application alleging that the discharge of three individuals on the date of application for certification contravened sections 72 and 76 of the Act as it was motivated, at least in part, by anti-union animus – Parkview took the position that one of the employees had been properly terminated at the end of his three month probationary period because he had difficulties performing some of the tasks equipment operators are required to perform – Parkview also presented evidence regarding its financial difficulties – Once the operations manager decided he would lay off two construction labourers in order to meet the need to reduce costs, he decided to terminate them the same day as the third individual, as he believed this would have less impact on the morale and productivity of the remaining workers – The applicant claimed that the operations manager's explanations were not credible, considering that there was no probationary period in place, and that the cost savings achieved were minimal compared to the financial difficulties the company faced – Furthermore, the employees were, contrary to past practice, laid off mid-week rather than at the end of the week – Finally, the operations manager was aware that an organizing campaign was underway and that the applicant had met with the excavating crew the day before the termination took place – The Board determined that Parkview had met the burden of proof to demonstrate that its decision to terminate the employees in question was not contrary to the Act – While the timing of the termination is very suspicious, there was no evidence of anti-union behaviour or that Parkview had reacted to the organizing efforts of the applicant in any illegitimate way – Given the operations manager's uncontradicted testimony and the failure to cross-examine him on this point, the Board refused to draw the inference that because the operations manager was aware that there had been a union meeting the day before the terminations, he knew the employees had signed cards during the meeting – Parkview's evidence was complete,

consistent and credible, and was not contradicted by the applicant – Finally, Parkview would have had no basis for knowing or even suspecting that the applicant was filing the application for certification the day the dismissals took place – That decision had been made by the applicant's co-ordinators the evening before and they had not informed any Parkview employee – Application dismissed

PARKVIEW HOMES, 149282 ONTARIO INC. AND 1490623 ONTARIO INC., PARKVIEW EXCAVATION SERVICES INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 ..... (Mar./Apr.) 240

Unfair Labour Practice – Construction Industry – Standing – The IUOE argued that Graham had no standing to advance allegations that the union had contravened the Act and, as a consequence, the membership evidence provided in the certification application did not reflect the true wishes of the employees in the bargaining unit – The impugned conduct suggested intimidation, misrepresentation and/or coercion – Distinguishing earlier jurisprudence, the Board held that an employer does have a legal interest in whether membership evidence that a union relied on to attain certification is a free expression of the employees' wishes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (Jan./Feb.) 32

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 ..... (Sept./Oct.) 523

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union

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EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175.....(Nov./Dec.) 523

Unfair Labour Practice – Duty to Bargain in Good Faith – OPSEU alleged that during bargaining the Art Gallery of Ontario did not disclose all information pertaining to funding for the reconstruction of the Gallery's Learning Centre and how that funding could lead to layoffs in the bargaining unit – OPSEU also claimed that the AGO accelerated the timing of layoffs after the union objected to the layoffs taking place during bargaining – The AGO denied any violation of the Act and asked the Board to exercise its discretion not to inquire into the complaint – The Board held there was no labour relations rationale to inquire into the first part of the complaint: the parties had reached a collective agreement in spite of OPSEU's suspicions, they had relatively stable labour relations, and they were not likely to face another expansion project as collective bargaining was, or was about, to take place – On the second issue, the Board found that there was labour relations rationale for inquiring into OPSEU's allegation of the accelerated layoffs – The Board found that OPSEU's allegations made out a *prima facie* case of a violation of section 70 of the Act – Because the first phase of the layoff schedule was implemented before the collective agreement was reached and because ten employees suffered lost work opportunities as a result of the accelerated layoffs, this portion of the complaint would warrant further inquiry by the Board – Matter continues

ART GALLERY OF ONTARIO; RE OPSEU .....(May/June) 274

Unfair Labour Practice – Duty to Bargain in Good Faith – Order for Productions – AMAPCEO alleged that the Crown had violated s. 17 of the Act when it failed to disclose to AMAPCEO a "secret" agreement to compensate OPSEU bargaining unit members in addition to the amounts published in the parties' signed collective agreement – During the course of the hearing, a confidentiality order was made relating to documents produced – The Crown sought a further permanent confidentiality order with respect to two letters that spelled out the "confidential compensation agreement" and were marked as exhibits in the proceeding – The Crown and OPSEU both argued that the absence of a permanent confidentiality order for the two documents would cause significant labour relations harm – The Board weighed the request for confidentiality against the open court principle – Having already ruled that the allegations of fact, if proven, would constitute a case for some remedial relief, the Board saw no reason to restrict AMAPCEO's ability to refer to the documents publicly – Request denied; matter continues

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; RE OPSEU.....(May/June) 294

Unfair Labour Practice – Interference with Trade Unions – Interim Relief – Remedies – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JOSEPH S. MANCINELLI; RONALD A. PINK; COSMO MANNELLA; RE JACK OLIVIERA; LUIS CAMARA .....(Jul./Aug.) 442

Unfair Labour Practice – Termination – Evidence – Practice and Procedure – The employer sought production of notes, which was resisted by the union on the basis of litigation privilege and confidential relationship privilege, taken by a union representative during a meeting, shortly after Dennee (an individual dismissed by the employer) had a discussion with the employer's principal, Scott – Dennee alleged that Scott told him he could get his job back if he could arrange to get all his friends to vote against the union and Scott denied ever asking Dennee to exercise his influence over the other employees – There was no dispute that the notes could constitute cogent and relevant evidence concerning the issues in dispute – On a review of the principles underlying confidential relationship privilege the Board found the key feature was that the communication occur in the context of an employee seeking advice from a union representative concerning an issue to which the union is obligated to give serious consideration – While the meeting between Dennee and the union representatives may have involved a discussion of his dismissal and the possibility of a grievance, the employer was not interested in this information and any references to it may be redacted from the notes – Another possible purpose of the meeting may have been to describe what just occurred in Dennee's discussion with Scott – Given that there was no evidence suggesting that Dennee was seeking advice from the union about how his conversation with Scott might assist him in his termination application (or any grievance), the Board could not see how a confidential relationship privilege existed – The Board found no connection between Dennee's dismissal and the application for termination, as they were fundamentally not the same litigation, and accordingly whatever litigation privilege may have existed did not extend to the application for termination of bargaining rights – As neither privilege attached, given the cogency and relevance of the notes, the Board ordered production – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; RE DEBBIE GIBSON ..... (Mar./Apr.) 232

Union Successor Rights – Bargaining Rights – Interim Relief – Intervenor – Practice and Procedure – Trade Union – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION ..... (Jan./Feb.) 114

Union Successor Rights – Related Employer – Sale of a Business – Stay – The union applied to have existing bargaining rights recognized under s. 1(4) and/or s. 69 of the *Labour Relations Act, 1995* – One of the respondents was an undischarged bankrupt – It was argued that proceedings should be stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* which prevents a creditor from engaging in proceedings against a debtor or a debtor's property for the recovery of a claim provable in bankruptcy – The Board found that a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer did not justify a stay in proceedings – Proceedings under s. 1(4) and/or s.69 are not proceedings for the recovery of a claim provable in bankruptcy despite previous Board jurisprudence – Where the trade union or the applicant claims further or additional relief which may involve recovering funds or requiring payment from the bankrupt, then the impact of the BIA, the necessity of a stay and requirement for the union to seek the approval of the bankruptcy court can be considered – Matter continues

MGI PACKERS INC.; MAPLE FREEZERS LIMITED; CONTINENTAL TRADING COMPANY LIMITED; CONTINENTAL MEAT PACKERS INC.; CONTINENTAL TRADING COMPANY INC.; MAPLE FREEZERS INC.; BURNSTAR FINANCIAL HOLDINGS INC.; HENRY MULLER; 1553602 ONTARIO LIMITED; RICHARD CLARE; GENCOR FOODS INC.; 1553603 ONTARIO LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 175 ..... (Jul./Aug.) 454

Witness – Certification – Construction Industry – Evidence – Practice and Procedure – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court"– In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with *some* prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice –The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed (September 23, 2011)

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (Sept./Oct.) 561

Witness – Certification – Construction Industry – Evidence – Practice and Procedure – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only

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ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Nov./Dec.) 561

Witness – Construction Industry – Evidence – Practice and Procedure – The union sought production of witness notes that were protected by litigation privilege – The Board followed the Court's decision in *Kennedy v. Mc v Kenzie* which set out a number of exceptions to the claim of privilege – The Board noted that there did exist another reasonable form of evidence that could provide the information that the union sought, namely, the witness may testify under oath before the Board – The Board also noted that while it had the authority to accept the evidence pursuant to s. 111(2)(e), it chose to exercise its discretion to follow the Court's approach in this instance – The Board declined to order the employer to produce the notes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....(May/June) 327

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